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In the Supreme Court of the United States

OCTOBER TERM, 1974

JAMES L. MITCHELL, ACTING SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	8
A. *Milliken* is controlling here	11
B. Inter-district relief is not supported by the findings in this case.	13
Conclusion	15
Appendix A	1a
Appendix B	17a
Appendix C	37a
Appendix D	41a
Appendix E	61a
Appendix F	64a

CITATIONS

Cases:

Bradley v. *Milliken*, 484 F. 2d 215, reversed, No. 73-434, July 25, 1974	7, 14
Chicago Housing Authority v. *The Honorable Richard B. Austin*, No. 74-1926 C.A. 7, decided January 24, 1975)	8
Garrett, et al. v. *City of Hamtramck, et al.*, 503 F. 2d 1236	9
Gautreaux v. *Chicago Housing Authority*, 296 F. Supp. 907	3, 4, 5, 14
Gautreaux v. *Chicago Housing Authority*, 304 F. Supp. 736	4
Gautreaux v. *Chicago Housing Authority*, 342 F. Supp. 827, affirmed, 480 F. 2d 210, certiorari denied, 414 U.S. 1144	6
Gautreaux v. *Chicago Housing Authority*, 384 F. Supp. 37	8
Gautreaux v. *Chicago Housing Authority*, 436 F. 2d 306, certiorari denied, 402 U.S. 922	5
Gautreaux v. *Romney*, 332 F. Supp. 366, reversed, 457 F. 2d 124	6

	PAGE
Hart v. *Community School Board of Brooklyn*, Nos. 74-2076, 74-2253, 74-2262, 74-2263 (C.A. 2, decided January 27, 1975)	9
James v. *Valtierra*, 402 U.S. 137	13
Milliken v. Bradley (No. 73-434, decided July 25, 1974)	2, 7, 8, 12, 13, 14, 15
Constitution and statutes:	
United States Constitution, Fifth Amendment	5
Civil Rights Act of 1964, 78 Stat. 252 42 U.S.C. 2000d, *et seq.*	2, 5, 10
Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 42 U.S.C. 5301, *et seq.*	9
U.S.C. 5301, *et seq.*:	
42 U.S.C. 5303	9
42 U.S.C. 5304(a)(4)	10
42 U.S.C. 5304(c)	10
42 U.S.C. 5309	10
42 U.S.C. 1401	12
42 U.S.C. 1437f	10
42 U.S.C. 1439	10
Illinois Revised Statutes:	
Ch. 67½, § 3	4
Ch. 67½, § 9	3, 6
Ch. 67½, § 17(b)	4
Ch. 67½, § 27(c)	4
Miscellaneous:	
Note, *Recent Cases*, 83 Harv. L. Rev. 1441 (1970)	4
Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. Pa. L. Rev. 1330 (1974)	4
Note, *Comments*, 44 N.Y.U.L. Rev. 1172 (1969)	4
Note, *Public Housing and Urban Policy: Gautreaux* v. *Chicago Housing Authority*, 79 Yale L.J. 712 (1970)	4
Note, *Recent Cases*, 22 Vand. L. Rev. 1386 (1969)	4
U.S. Dept. of Commerce, 1970 Census of Population, Vol. 1, Pt. 15, table 11, pp. 55-57	11

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v.

DOROTHY GAUTREAUX, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Housing and Urban Development, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The initial opinion of the district court (App. A, *infra*, pp. 1a-16a) is unreported. The initial opinion of the court of appeals (App. B, *infra*, pp. 17a-36a) is reported at 448 F. 2d 731. The district court's decision denying metropolitan-wide relief (App. C, *infra*, pp. 37a-40a) is reported at 363 F. Supp. 690. The court of appeals' decision reversing that order (App. D, *infra*,

pp. 41a-60a) and its decision denying rehearing (App. E, *infra*, pp. 61a-63a) are reported at 503 F. 2d 930 and 939.

Jurisdiction

The judgment of the court of appeals (App. F, *infra*, p. 64a) was entered August 26, 1974, and a timely petition for rehearing was denied on September 30, 1974. On December 20, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 13, 1975, and on February 7, 1975, Mr. Justice Brennen further extended the time for petitioning to February 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented

Whether, in light of *Milliken* v. *Bradley* (No. 73-434, decided July 25, 1974), it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.

Statute Involved

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Statement

In 1966, six black residents of Chicago, Illinois, brought this action against the Housing Assistance Administration, then an agency of the Department of Housing and Urban Development ("HUD"), on behalf of the class of black tenants in, and applicants for, public housing projects in Chicago (Complaint, pp. 2-3). The complaint alleged that HUD was "assist [ing] in the carrying on of a racially discriminatory public housing system within the City of Chicago" (Complaint, p. 2). Plaintiffs sought a declaratory judgment to that effect and an injunction against federal financial assistance to the Chicago Housing Authority ("CHA") "in support of the racially discriminatory aspects of the public housing system within the City of Chicago," together with "such other and further relief as the Court may deem just and equitable" (Complaint, pp. 15-16).

This action was stayed in the district court pending the initial disposition of the plaintiffs' companion suit against CHA. In that suit, the district court granted summary judgment against CHA, finding, *inter alia*, that its site-selection practices were racially discriminatory.[1] Illinois Revised Statute, Ch. 67½, § 9, required City Council approval of each proposed public housing site. Before seeking that approval, CHA submitted proposed sites to the alderman in whose ward the site was located for his approval. This informal pre-clearance procedure was held discriminatory because, although CHA had selected forty-one sites in predomi-

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[1] *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill.)

nantly white areas and sixty-two sites in black areas between 1955 and 1966, only two of the white sites, in contrast to forty-nine of the black sites, had been approved by the appropriate alderman and the City Council. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907, 911 (N.D. Ill.).

To remedy this discrimination, the district court issued an injunction on July 1, 1969, which required specified affirmative action by CHA. *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736 (N.D. Ill.). In addition to enjoining CHA from using the pre-clearance site-selection procedure, the order directed CHA to build its next 700 dwelling units in the predominantly white areas of Cook County.[2] Thereafter, three-fourths of CHA's new units were to be built in such areas, while the remaining one-fourth could be placed in the predominantly black portions of Cook County. CHA was also ordered to use its best efforts to increase the supply of dwelling units.[3]

The decree was subsequently modified by ordering CHA to propose sites for 1,500 dwelling units by a specified deadline. That order was affirmed by the

[2] The order permitted one-third of these units to be placed outside of Chicago. The jurisdiction of CHA is limited to the City of Chicago (see Ill. Rev. Stat., Ch. 67½, §§ 3, 17(b)), but CHA is authorized to contract with the Cook County Housing Authority to operate in the areas of Cook County outside the City (see Ill. Rev. Stat., Ch. 67½, § 27c).

[3] The district court's decision was widely discussed in the legal journals. *E.g.*, Note, *Public Housing and Urban Policy: Gautreaux* v. *Chicago Housing Authority*, 79 Yale L.J. 712 (1970); Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. Pa. L. Rev. 1330 (1974); Note, *Recent Cases*, 83 Harv. L. Rev. 1441 (1970); Note, *Comments*, 44 N.Y.U.L. Rev. 1172 (1969); Note, *Recent Cases*, 22 Vand. L. Rev. 1386 (1969).

court of appeals, *Gautreaux* v. *Chicago Housing Authority,* 436 F. 2d 306, 310 (C.A. 7), and this Court denied certiorari. 402 U.S. 922.

The district court then dismissed the action against HUD (App. A, *infra,* pp. 1a-16a), but the court of appeals reversed that decision and directed that summary judgment be entered for the plaintiffs (App. B, *infra,* pp. 17a-36a). That court held that "HUD's knowing acquiescence in CHA's admitted discriminatory housing program" violated the Fifth Amendment and the 1964 Civil Rights Act, 42 U.S.C. 2000d (App. B, *infra,* p. 29a).[4] It emphasized that its "holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency" and suggested that the district court might find that "little equitable relief above the entry of a declaratory judgment and a

[4] The court stated that it was "fully sympathetic" to HUD's dilemma of either funding desperately needed public housing on sites in black areas approved by the City Council or "deny[ing] housing altogether to the thousands of needy Negro families of that city" (App. B. *infra*, pp. 29a, 31a).

The court acknowledged, moreover, that HUD had made "numerous and consistent efforts" toward desegregation of public housing in Chicago (App. B, *infra,* p. 28a). Indeed, in 1966, HUD rejected five of the sites selected by CHA which were among those specifically challenged in respondents' complaint. The sites were rejected because they were in areas of high black concentration and, in some cases, in areas also having a high concentration of public housing (Deposition of Joseph Burstein taken March 25, 1968, p. 105). 1966 was the first year the Chicago City Council approved any sites in white areas. See *Gautreaux* v. *Chicago Housing Authority, supra*, 296 F. Supp. at 911.

While the propriety of granting relief against the Secretary in these circumstances is open to question, that question is not being presented in this petition because the relief granted against the other defendants in this case would have substantially the same effect on HUD's programs in any event.

simple 'best efforts' clause will be necessary to remedy the wrongs which have been found to have been committed" (App. B, *infra,* p. 36a).

Since 1971, the district court has been attempting to frame and implement appropriate remedial decrees applicable to CHA and HUD.[5] In the order underlying this petition, the district court directed HUD to use its "best efforts to cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with" all applicable federal statutes, HUD rules and regulations, and the provisions of the judgment against CHA and all other final orders in this litigation (App. C, *infra,* p. 40a).

It rejected the order proposed by respondents, which would have directed CHA and HUD to use their best efforts to provide dwelling units outside the City in the portions of Cook, DuPage, and Lake Counties that comprise the Chicago Urbanized Area.[6] The district court also refused to conduct additional proceedings

[5] In one remedial decree, the district court enjoined HUD from releasing model cities funds to Chicago until the City approved 700 sites for public housing. *Gautreaux* v. *Romney,* 332 F. Supp. 366 (N.D. Ill.). The court of appeals reversed that order on the ground that it was improper to threaten the termination of one program, untainted by discrimination, in order to cure discrimination in a different program. *Gautreaux* v. *Romney,* 457 F. 2d 124 (C.A. 7).

In another remedial decree, the district court ordered CHA to proceed with the steps necessary to provide the previously ordered 1,500 dwelling units without regard to Illinois Revised Statute, Ch. 67½, § 9, which required CHA to obtain the approval of the City Council before acquiring real property. *Gautreaux* v. *Chicago Housing Authority,* 342 F. Supp. 827 (N.D. Ill.), affirmed, 480 F. 2d 210 (C.A. 7), certiorari denied, 414 U.S. 1144.

[6] Plaintiffs' Proposed Judgment Order and Memorandum filed September 25, 1972.

similar to those followed in *Bradley* v. *Milliken,* 484 F. 2d 215 (C.A. 6), reversed No. 73-434, July 25, 1974, designed to develop a plan to provide metropolitan-wide relief.[7] Instead, it concluded (App. C, *infra,* p. 38a):

> such relief * * * is simply unwarranted here because it goes far beyond the issues of this case. * * * The wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein.

On appeal, the Seventh Circuit (*per* Mr. Justice Clark) reversed this order and directed the district court to adopt "a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago * * * but will increase the supply of dwelling units as rapidly as possible" (App. D, *infra,* p. 59a). This Court's decision in *Milliken* v. *Bradley,* No. 73-434, decided July 25, 1974, was distinguished on the grounds that there was no tradition of local control of public housing comparable to the tradition in public schools, that the administrative problems of an inter-district remedy are far less serious for public housing than for schools, that there was evidence of racial discrimination in public housing in the Chicago suburbs, and that HUD and CHA had agreed that a metropolitan solution to the Chicago housing problem was necessary. Judge Tone

[7] Plaintiffs' Motion and Proposed Order, filed January 29, 1973.

dissented on the ground that *Milliken* was controlling (App. D, *infra*, p. 60a).

In denying the government's motion for rehearing, the court of appeals concluded that the showing of a significant inter-district segregative effect required by *Milliken* as a precondition of an inter-district remedy was met in this case by the supposition that "defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight'" to the suburbs (App. E, *infra*, p. 62a).[8]

Reasons for Granting the Writ

The decision below conflicts with this Court's recent decision in *Milliken* v. *Bradley*, No. 73-434, decided July 25, 1974, which holds that separate governmental districts may not be consolidated for remedial purposes unless it is first shown "that there has been a constitutional violation within one district that produces a significant segregative effect in another district * * *. [W]ithout an inter-district violation and inter-district effect, there is no constitutional wrong calling for

[8] The court of appeals also directed that "intra-city relief should proceed apace without further delay" (App. E, *infra*, p. 63a). The district court then referred the case to a master "to determine and identify the precise causes of the five-year delay in implementing [the court's] judgment orders, and to recommend a plan of action that will expedite the realization of [its] various orders and judgments." *Gautreaux* v. *Chicago Housing Authority*, 384 F. Supp. 37-38 (N.D. Ill.). CHA's petition for mandamus seeking to vacate this referral was denied. *Chicago Housing Authority* v. *The Honorable Richard B. Austin*, No. 74-1926 (C.A. 7, decided January 24, 1975).

an inter-district remedy" (slip op. 25). Unless this conflict is promptly resolved, the implementation of federally assisted programs to improve low income housing will be seriously hampered, not only in Chicago but throughout the nation, and progress toward the goal of integrated housing will be impeded.

Uncertainty concerning the proper scope of relief in this case, and in others seeking affirmative relief for past allegedly discriminatory practices,[9] operates to discourage participation by suburban jurisdictions in federally assisted programs. Under the decision below, if a suburb approves new public housing, it risks an order directing that such units be made available, not only to the suburb's needy residents, but also to the plaintiff class in the center city suit—here, CHA's tenants and applicants.

This chilling effect extends beyond the traditional public housing programs to the new programs created by the Housing and Community Development Act of 1974, Pub. L. 93-383, 88 Stat. 633 *et seq.*, 42 U.S.C. 5301, *et seq.*, such as the block grant program[10] (88 Stat. 637,

[9] *Garrett, et al.* v. *City of Hamtramck*, 503 F. 2d 1236 (C.A. 6); *Hart* v. *Community School Board of Brooklyn* Nos. 74-2076, 74-2253, 74-2262, 74-2263 (C.A. 2, decided January 27, 1975); *Baker* v. *F&F Investment Company, HUD*, N.D. Ill., C.A. No. 69 C-15; *Francis E. Hale* v. *Memphis Housing Authority*, W.D. Tenn., C.A. No. C-73-410; *Dotson* v. *Lynn*, City of Toledo, N.D. Ohio, C.A. No. C74-531; *Griffin* v. *City of River Rouge*, E.D. Mich., C.A. No. 36516; *Palmer* v. *City of Jackson*, E.D. Mich., C.A. No. 4-72161.

[10] The block grant program, 42 U.S.C. 5301, *et seq.*, is a form of special revenue sharing providing for the distribution of funds to units of local government on the basis of an objective formula weighing such factors as population, poverty and housing overcrowding. It supersedes programs such as the urban renewal,

42 U.S.C. 5303)[10] and the Section 8 subsidized housing program (42 U.S.C. 1437f).[11] Since these programs must themselves be nondiscriminatory (42 U.S.C. 2000d and ~~(88 Stat. 649)~~ 5309), progress toward the goal of integrated housing will be set back to the extent that the suburbs are deterred from participating in them.

Prompt review of the court of appeals decision by this Court will also avoid the possibly fruitless expendi-

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model cities and neighborhood development programs, but the permissible uses for the new funds are essentially the same as those previously supported.

Each application by a local governmental unit for block grant funds must be accompanied by a "housing assistance plan," which must (1) survey existing housing and assess the housing assistance needs of lower-income persons, including those expected to reside in the community; (2) state a realistic annual goal for the number of units or persons to be assisted, and (3) indicate the general locations of the proposed housing (88 Stat. 638, 42 U.S.C. 5304 (a)(4)).

The Secretary is required to approve an application for a block grant unless it is (1) "plainly inconsistent" with generally available facts and data, (2) "plainly inappropriate" to meeting the needs identified by the recipient, or (3) not in compliance with applicable law (88 Stat. 639, 42 U.S.C. 5304(c)).

[11] The Section 8 program, 42 U.S.C. 1437f, initiates a new program of payments to lower-income tenants for the purpose of assisting them to occupy new, rehabilitated and existing family units. The basic subsidy to be paid by HUD is the difference between the market rent for the unit to be occupied and a percentage of the tenant's gross income. The housing may be provided by a local housing authority, or directly by contract between HUD and the owner of newly constructed property.

Determinations of tenant eligibility, tenant selection and tenant assignment are made by the owner or the housing authority, as the case may be. Nothing in the legislation requires any community to take steps to participate in the Section 8 program. The local community has substantial involvement in the critical decisions affecting a Section 8 program under the provisions of 42 U.S.C. 1439, to assure that such programs are consistent with local housing assistance plans, or other local housing programs.

ture of substantial efforts by the parties involved and the lower courts. The formulation of the area-wide plan which the court of appeals has directed will necessarily be a complex, time-consuming, and expensive undertaking involving numerous parties in the district court.[12] And this Court's decision in *Milliken* indicates that whatever plan eventually results will ultimately be declared to be an inappropriate remedy.

The court of appeals first attempted to distinguish *Milliken* as inapplicable to efforts to remedy discriminatory housing practices (App. D, *infra,* pp. 52a-59a). On rehearing, the court instead suggested that the record here supports inter-district relief under the test enunciated in *Milliken* (App. E, *infra,* pp. 62a-63a). Neither rationale is sound; the result below is basically inconsistent with *Milliken.*

A. *Milliken is controlling here.*

The court of appeals interpreted *Milliken* as deciding only that in the context of school desegregation, inter-district relief was impractical, and concluded that such relief was not impractical to remedy housing segregation. Both the premise and the conclusion are incorrect.

Milliken focused on the lack of evidence of any inter-district wrong, not on the impracticality of the relief sought. The Court's basic holding was that it was improper to use the population of one governmental unit as a racial reservoir available to cure racial discrimination occurring within a different governmental unit—

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[12] There are more than 100 separate cities, villages and townships in the Chicago urban area. U.S. Dept. of Commerce, 1970 Census of Population, Vol. 1, Pt. 15, table 11, pp. 55-57.

regardless of the presence or absence of administrative problems. And, as a corollary, the Court indicated that an inter-district remedy would be appropriate where constitutional violations had been a substantial cause of inter-district segregation, despite problems of practicality (see slip op. at 25; see, also, White, J., dissenting, *id.* at 9).

In any event, similar considerations of practicality apply to fashioning such relief for public housing projects or for schools. The Court in *Milliken* noted that inter-district relief would be difficult to implement because it would require a massive restructuring of local governmental units and redefinition of their responsibilities (slip op. at 22-24). Similarly, inter-district relief in the housing field would require massive federal intervention in areas of peculiarly local responsibility. HUD's control over local public housing is far more limited than that of the State over local public schools. Although the public housing program rests upon federal financial support, and HUD's approval is required for many details of a local housing authority's operations, the initiative for public housing rests with local authorities.[13]

Perhaps even more importantly, the construction of public housing usually requires that many municipal services be expanded—not only the sewers, waterlines, and electricity directly required by the building, but also streets, schools, transportation and similar services required by the new residents. HUD has no authority to provide these services; they are the sole responsi-

[13] "It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility • • •." 42 U.S.C. 1401. See, *e.g.*, notes 10 and 11, *supra*.

bility of the community in which the housing is located (*James* v. *Valtierra*, 402 U.S. 137, 143 n. 4).[14] By contrast, in *Milliken*, the State had ultimate responsibility for the local school systems, which were state agencies (Marshall, J., dissenting, slip op. at 13-18). The State could thus more readily implement any inter-district relief ordered in *Milliken* than could HUD implement such relief in the instant case.

The court of appeals overlooked the necessity of arranging for all the required municipal services in concluding that the administrative problems of an inter-district housing remedy were "not remotely comparable" to the problems of inter-district school busing (App. D, *infra*, p. 53a). Since implementation of any inter-district remedy would require each of the more than 100 political jurisdictions in the metropolitan area that may be required to participate[15] to provide the necessary municipal services, the administrative problems involved are at least as great as those involved in inter-district busing. The experience in attempting to implement the Chicago-only remedy over the past five years indicates that an inter-district remedy may well pose practically insurmountable administrative problems.

B. *Inter-district relief is not supported by the findings in this case.*

In its order on rehearing, the court of appeals apparently conceded that *Milliken* requires a showing here that "there has been a constitutional violation within

[14] The other party to the suit, the Chicago Housing Authority, is similarly powerless over housing constructed in the suburbs.

[15] See note 12, *supra*.

one district that produces a significant segregative effect in another district" (*Milliken supra,* slip op. at 25). It concluded that such an effect is shown by the record here, because the discrimination in Chicago "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon" (App. E, *infra,* p. 62a).[16] But it would have been equally plausible to assume that the constitutional violations which created segregated schools within Detroit had had a similar effect. Indeed, in contrast to the school systems involved in *Milliken,* there has evidently been no exodus of white tenants from Chicago housing projects to suburban public housing projects, since both the city and suburban public housing projects have predominantly black tenants. *Gautreaux* v. *Chicago Housing Authority, supra,* 296 F. Supp. at 910. Here, as in *Milliken,* "the Court of Appeals shifted the primary focus from a

[16] The court of appeals' prior opinion suggested (App. D, *infra,* p. 54a) that evidence of suburban discrimination appeared in plaintiffs' Exhibit 11. But of the twelve suburban projects identified in that exhibit, three are located in predominantly white census tracts, five are located in municipalities which have no predominantly white census tracts, two were completed in 1953 and the racial balance at that time is not shown, one is in a tract which apparently became predominantly black after approval and completion, and one is in a tract which was at the time of completion predominantly, but not exclusively, black.

Significantly, plaintiffs did not argue in the court of appeals that they had proved an inter-district wrong. Instead, relying upon *Bradley* v. *Milliken,* 484 F. 2d 215 (C.A. 6), before this Court reversed that decision, plaintiffs contended that "the circumstance that the violation in this case took place within the political boundaries of the City of Chicago affords no reason for limiting the remedy to those boundaries • • •." Reply Brief to Brief of Appellee HUD, p. 4, filed June 7, 1974; see, also, Plaintiffs' Memorandum, p. 11, filed August 14, 1974.

[city-wide] remedy to the metropolitan area only because of [its] conclusion that total desegregation of [the city] would not produce the racial balance which [it] perceived as desirable" (slip op. at 20). This approach is incorrect here, as it was in *Milliken,* because the Constitution does not require any particular racial balance in a given public facility—what it does require is a unitary system (*id.* at 21, 27).

The district court specifically found that "It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein" (App. C, *infra,* p. 38a). Accordingly, this case lacks the factual foundation that would, under *Milliken,* justify inter-district relief.[17]

[17] Even if it be assumed that *Milliken* requires only that *either* an inter-district wrong *or* an inter-district effect be shown (slip op. at 25-27; Stewart, J., concurring, *id.* at 3-4), neither showing was made here. The court of appeals simply stated that "it is reasonable to conclude from the record" that the housing authorities' actions "may well have fostered racial paranoia," and that the "extra-city impact of defendants' intra-city discrimination appears to be profound" (App. E, *infra,* p. 62). Such speculative conclusions are not sufficient to show an inter-district effect.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 1975.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Civil Action No. 66 C 1460
(Filed September 1, 1970)

Dorothy Gautreaux, et al., plaintiff

vs.

George W. Romney, Secretary of the Department of Housing and Urban Development of the United States, defendant

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MEMORANDUM

The allegations of this complaint concern the same discriminatory pattern of public housing site selection considered by this court in the companion case and which was found to violate the Fourteenth Amendment to the Constitution. *Gautreaux v. Chicago Housing Authority,* 269 F. Supp. 907 (1969) and 304 F. Supp. 736 (1969). Proceedings in the instant suit against the Secretary of the Department of Housing and Urban Development were stayed pending resolution of that earlier suit. Ruling on defendant's pending motion to dismiss, plaintiffs' motion to consolidate and for discovery were deferred. The earlier suit having come to judgment, defendant has renewed its motion to dismiss,

which is to be treated as a motion for summary judgment under Rule 12(b), F.R.C.P. The plaintiffs have withdrawn their motions and have filed a motion for summary judgment which seeks to add the Chicago Housing Authority as a party defendant.

The amended complaint seeks a declaratory judgment that the defendant Secretary has "assisted in the carrying on, and . . . continues to assist in the carrying on, of a racially discriminatory public housing system within the City of Chicago" by granting federal financial assistance. ¶¶ 2, 20, Amended Count I. It is requested that defendant be permanently enjoined from further funding. The inappropriateness of that type of relief, however, has been conceded by all parties.

Although not expressly conceded, infirmities exist in Counts III and IV which are identical to those counts in 66 C 1459 wherein the court held that there was a failure to state a claim absent allegations of intentional and deliberate discrimination. *Gautreaux v. C.H.A.*, 265 F. Supp. 582, 584 (1967).[1] Accordingly, the motion to dismiss Counts III and IV is granted.

The renewed motion to dismiss as to Counts I and II is premised on five grounds:[2] (1) that plaintiffs do not have standing or a capacity to sue this defendant; (2) that plaintiffs have failed to exhaust their administrative remedies; (3) for failure of jurisdiction over the

[1] "A public housing program conscientiously administered in accord with the statutory mandate surrounding its inception (Ill. Rev. Stats., Ch. 67-½, §§ 1, 2 et seq.) and free of any intent or purpose, however slight, to segregate the races, cannot be condemned even though it may not affirmatively achieve alterations in existing patterns of racial concentration in housing, however desirable such alterations may be. A showing of affirmative and discriminatory state action is required. • • •"

subject matter; (4) for failure to state a claim upon which relief can be granted; and (5) for failure to join an indispensable party, i.e. the Chicago Housing Authority under Rule 19. The last ground is now obviated by plaintiffs request for such joinder and in the light of *Powelton v. HUD,* 284 F. Supp. 809, 814 (D.C. Pa., 1968); *Bro. Locomotive Engrs. v. Denver & R.G.W.,* 290 F. Supp. 612, 615 (D.C. Colo. 1968); *Kletschka v. Driver,* 411 F. (2d) 436, 442 (C.A. 2, 1969); and unpublished opinion of my learned colleague Judge Hoffman in *Inmates of Cook County v. Tierney,* 68 C 504, this court would hold the joinder proper if the complaint withstands the other grounds of defendant's motion. In addition, the court having previously held in the earlier action (265 F. Supp. 582, 583) that said plaintiffs have standing to sue the Chicago Housing Authority and also holds that the same considerations must govern in this action and that standing exists in this suit. *Data Processing v. Camp,* 397 U.S. 150 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970); *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *Flast v. Cohen,* 392 U.S. 83 (1968).

There remains the troublesome question of jurisdiction and failure to state a claim upon which relief can be granted. Count I of the Amended Complaint invokes the court's jurisdiction under § 1331,[3] 28 U.S.C. in that the "rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth

[3] § 1331. *Federal Question; amount in controversy;* costs. (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Amendment to the Constitution of the United States" and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs.

Defendant contends there is lacking the requisite jurisdictional amount because no single plaintiff has an interest approaching $10,000 in any of the subsidies which the defendant has granted. Plaintiff responds that the amount in controversy is to be gauged by the "pecuniary result to either party which the judgment would directly produce" and in any event the rental interest of one of the plaintiffs, Robert M. Fairfax, who has been a tenant in CHA housing since 1945 would to date equal the sum of $15,000 even if it averaged $50 per month. (Response Brf. to Reply, p. 2 fn) Neither approach is sound. The rule governing dismissal for want of jurisdictional amount is that, unless the law gives a different rule, the sum claimed by the plaintiff in good faith at the time of filing controls. 1 Moore Fed. Prac. ¶ 0.91, pp. 825-828. Cf. *Giancana v. Johnson,* 335 F. (2d) 366 (C.A. 7, 1964), cert. den. 379 U.S. 1001. A monetary value is difficult to assess in cases where violation of fundamental constitutional rights is alleged, and it does not appear in this instance that the allegation is not made in good faith. Further, aggregation in class actions is permitted where "one or more plaintiffs unite to enforce a single title or right in which they have a common and undivided interest." *Snyder v. Harris,* 394 U.S. 332, 335 (1969); *Brown v. Trousdale,* 138 U.S. 389 (1891). Where "the action is based on a public right, not on personal claims, the amount in controversy is the aggregated claim of the class, that is, the public's claim." 3A Moore Fed. Prac.

¶ 23.13, p. 3482; cf. *Potrero Hill Community Action v. Housing Authority of City and County of San Francisco,* 410 F. (2d) 974, 977 (C.A. 9, 1969).

From the argument that plaintiffs have standing to sue under the Fifth Amendment, plaintiff asserts that it is beyond dispute that an aggrieved citizen may sue a federal official for violation of his rights thereunder. In citing *Bolling v. Sharpe,* 347 U.S. 497 (1953) the plaintiff finds support for the application of the Fifth Amendment due process clause to that of the equal protection clause of the Fourteenth Amendment. The Supreme Court of the United States in that case dealt with the validity of segregation in the public schools of the District of Columbia. In holding that the District, being a body politic apart from the States, and thus not under the inhibition of the Fourteenth Amendment equal protection clause, the Supreme Court applied the Fifth Amendment due process clause because (p. 500)

> "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. * * *"

In making that application, the Court said: (p. 498)

> "We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable to the District of

Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of laws' is a more explicit safeguard of prohibited unfairness than 'due process of law' and therefore, we do not imply that the two are always interchangeable phrases. But as this Court has recognized discrimination may be so unjustifiable as to be violative of due process. * * *"

Thus because of the unique status of the District of Columbia the Fifth Amendment was directly applied to implement desegregation of the public school in that district.

This is not to say that the Fifth Amendment does not apply as a restraint against federal officials, but its application has been confined to their actions as exercised under statutory authority apart from the Amendment alone, and except as such authority was exercised in violation thereof or under the common law. This is borne out by the plaintiffs cited cases of *Schneider v. Rusk,* 377 U.S. 163 (1963) wherein the Supreme Court of the United States held unconstitutional a section of the Immigration and Naturalization Act which resulted in loss of American citizenship acquired through naturalization by continuous residence for three years in the country of origin whereas an American born citizen did not suffer the same consequence. In *Kent v. Dulles,* 357 U.S. 116 (1958) a passport was denied under a regulation precluding granting the same to members of the Communist party. The Court concluded that no

statute delegated to the Secretary the kind of authority he exercised in promulgating the regulation and that he acted beyond his authority. In *Flast v. Cohen,* 392 U.S. 83 (1969) the expenditure of tax monies to finance instruction and instructional materials in religious schools was alleged to be in excess of the Secretary's authority under the Elementary and Secondary Education Act of 1965 and also that if such action was within the Act, then the Act was to that extent unconstitutional and void.

These cases found their premise for jurisdiction in unauthorized or undelegated exercises of power under existent Congressional statutes. With the exception of *Bolling v. Sharpe,* supra, they come within the exceptions to the right to sue the sovereign and find their premise not in the Fifth Amendment alone or any other Constitutional amendment, but in the circumscribed exercise of delegated authority under legislative enactments. From the passage of the Civil Rights Act, it also appears that Congress recognized that the Constitution in itself is not the source for authorizing a cause of action. No statutory premise is here alleged in Count I. Plaintiff stresses heavily that liability is on the basis of "joint participation" with the Chicago Housing Authority in perpetuating a racially discriminatory public housing pattern, *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1960).

The court holds that the Fifth Amendment in the circumstances here alleged by this suit does not authorize suit against the defendant Secretary and the general federal question jurisdiction section does not confer authority for such suit. Therefore, Count I fails

to state a claim over which this court has power to exercise jurisdiction or to grant relief and the same is dismissed.

Count II is premised on § 1331 and § 1343(4),[3] 28 U.S.C. in that the "rights sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42 U.S.C. § 2000d[4] [Section 601, Title VI of the Civil Rights Act of 1964] and the matter in controversy exceeds the value of $10,000, exclusive of interest and costs."

Under § 2000d-1, 42 U.S.C., the Secretary was authorized to promulgate rules and regulations to effectuate such nondiscriminatory action in any federally funded program. Compliance therewith

> "may be effected (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, * * * or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. * * *"

[3] " § 1343(4). *Civil rights and elective franchise.* The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[4] § 2000d, 42 USC. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

In meeting the government's contention that there exist genuine issues of material fact which preclude entry of summary judgment, plaintiff states that its motion for summary judgment admits that defendant made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing prjoects in white neighborhoods" and therefore no dispute exists as to any material fact. The only issue remaining is whether despite these salutary efforts on the part of defendant, did the continued approval and funding of a discriminatory housing program make the defendant a joint participant in the violations which CHA has been found to have committed; or, should the defendant in order to absolve itself of any of the illegal aura permeating CHA action have terminated federal financial assistance or followed another method as authorized under the Civil Rights Acts § 2000d-1 in lieu of continued funding and approval.

Plaintiff seeks to ground his claim for injunction to terminate funding on the theory of joint participation as found to exist in *Burton v. Wilmington Parking Authy.*, supra. Burton had been refused service by a restaurant operator who leased premises from an agency of the State of Delaware. The building in which the restaurant was located was on public land, was built with public funds for public purposes, and was owned and operated by an agency of the State. The court held that when a State leases property, the proscription of

the Fourteenth Amendment must be complied with by the lessee, stating (p. 725):

> "But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. * * * By its inaction the Authority and through it the State has not only made itself a party to the refusal but elicited to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle (leased restaurant) that it must be recognized as a joint participant in the challenged activity which on that account cannot be considered to have been purely private as to fall without the scope of the Fourteenth Amendment."

It is of importance to note that joint participation was applied where a private party violated constitutional rights and wherein the government by virtue of its identity with such private party had been held to be a party to such private act; i.e., such private party stands in the shoes of the public entity. *Simkins v. Cone Memorial Hosp.*, 323 F. (2d) 959 (C.A. 4, 1963); *Colnon v. Tompkins Square Neighbors, Inc.*, 294 F. Supp. 134 (D.C.N.Y., 1968). Thus, evidentiary hearings were held in *Burton* to "sift" facts as to whether private discriminatory conduct was imbued with governmental participation and to determine whether such private being became an instrumentality of the government. The CHA is a public body performing a governmental and public function and we are thus not concerned with

the "sifting" process to determine whether the acts of any private party were the acts of CHA or those of the federal government. But, plaintiff urges that CHA was found responsible in the earlier action although the acts fostering the illegal conduct were those of the City Council and that the measure of this defendant's liability must be the same. However, the responsibility of CHA was based on the theory of agency. Thus in *Cooper v. Aaron*, 358 U.S. 1 (1958) where the good faith attempts of the school district in desegregating was being frustrated by other state officials, the Court said:

> ". . . it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of respondents when vindication of those rights was rendered difficult or impossible by the actions of other state officials . . ." pp. 15-16.

They were held to be agents of the State even though the acts of the Governor and the Legislature made impossible the implementation of the desegregation of the public schools. Indeed, in the companion case CHA could not act without the City Council in the performance of its governmental function.

The court is asked to extend the joint participation principle of *Burton* to the approval and funding, with attendant supervision, of the Department of Housing and Urban Development, an executive department of the federal government. In effect, under the *Burton* analogy, that the acts of the Chicago Housing Authority and the Chicago City Council were the acts of the federal government; that in the performance of their

governmental functions they became the instrumentalities of the federal government and thus their acts became the acts of the federal government. To state such a proposition is to reveal its inapplicability. Except as the separate acts of each are the result of concerted action to commit the tort of discrimination, joint participation cannot be extended to separate and distinct political entities and sovereignties each of whom are autonomous in their governmental functions. No such activity on the part of separate governmental entities can be equated to the *Burton* application. It is an ever-recurring fact that federal governmental financing is granted with greater frequency where needed to improve the condition of citizens of states, counties and cities, without thereby making the federal government a partner in the end result. Funding and approval have not so reached into the operations of CHA so as to make its functions federal governmental functions. If this were so, every federal funding, accompanied by supervision, would per se become a federal function and subsequent use become federal action. Even *Hicks v. Weaver,* 302 F. Supp. 619, (D.C. La. (1969)) does not so hold.

The court is confronted, however, with a defendant who made efforts to correct the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take. Justification for such action was made because

> ". . . faced with the tough dilemma of accepting some other sites proposed by the authority that were believed to be lawful but not optimal, or rejecting

> those sites and depriving potential housing tenants of improved shelter, HUD chose the former alternative."

In this court's view, the essence of defendant's wrong, if any, is not continued funding and approval but a purported dereliction of a stated statutory duty under § 2000d-1, i.e., HUD could have terminated funding or have used other means to insure compliance. Cf. *United States v. Frazier,* 297 F. Supp. 319 (D.C. Ala., 1968). The fact that the Secretary did not pursue either of those steps does not result in making him a joint participant with CHA.

While the suit is not couched in the remedy to enjoin an official act on the ground that it was not within the authority conferred upon the defendant, or that it was an improper exercise of such authority, or that Congress lacked power to confer the authority, it is in reality such an action and the only action which plaintiff can bring against this defendant. The court believes that plaintiffs have misconceived the remedial claim which should be taken and Count II of the amended complaint is dismissed for failure to state a claim upon which relief can be granted.

Because many of the amici and plaintiffs themselves have through their briefs emphasized the importance and necessity of this defendant's supervision through a precisely formulated decree, the court feels their plea must be dealt with at this time even though nothing remains of the action upon which to premise that relief. Therefore, even if the action were alleged to be in derogation of defendant's statutory duty and power, and even if the court were to find that such duty and

power were exercised in violation of plaintiffs' rights, the effect of the remedy sought as disclosed by plaintiffs and amici will be considered.

Where an agent or officer of the government purporting to act on its behalf have been held to be liable for his conduct which caused injury to another, the ground of liability must be found either in that he exceeded his authority or that it was not validly conferred. The action is therefore a personal action against the officer and not an action against the United States and an injunction against that officer is not against the sovereign for the sovereign cannot be enjoined.

The critical consideration is not the identity of the parties, however, but rather the result of the judgment or decree which might be entered. *Minn. v. Hitchcock,* 185 U.S. 373, 387 (1902). The perimeter of such remedy has been set forth in *Dugan v. Rank,* 372 U.S. 609, 620 (1963):

> "The general rule is that a suit is against the sovereign if 'the judgment sought would expend on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' "

Plaintiffs and amici contend that if HUD can feasibly contribute to a prompter remedy than that contained in the decree heretofore entered against CHA which would accelerate desegregation of public housing in Chicago and create more new low income housing not only in the central city but in the General Public Housing area encompassing the remainder of Cook County [304 F. Supp. 736, 737], then they are entitled

to an order calling for such efforts. Thus, the remedy should be framed with respect to that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago Housing Market area; that the order "will fashion the means of dealing with a major societal problem" which problem is that of increasing segregation of the races in the Chicago Metropolitan housing area and the serious lack of low income housing. Reference is made to major governmental study commissions which have reported on evidence that the problem is not confined to the central city but that much of that problem is engendered through existence of a circle of surrounding white suburbs.

Buttressed by these scholarly reports, the plaintiffs appeal to this court is found in the language of the Supreme Court of the United States in *Louisiana v. United States,* 380 U.S. 145, 154 (1964):

> "We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."

However, even that case does not give free license to the court to determine and encompass issues not existent in the complaint before it. [See Fn. 17, p. 154].

It appears clear to this court that the relief so earnestly desired by plaintiffs and amici would entail a decree operative against the defendant in his official capacity and not otherwise. The relief sought would not be effected by merely ordering the cessation of conduct. Cf. *Hicks v. Weaver,* supra. The defendant

Secretary could satisfy the suggested methods of implementation to be contained in this decree only by acting in his capacity as Secretary of the Department of Housing and Urban Development in discharging the myriad functions and programs entrusted to him by Congress.

This court does not have jurisdiction to direct and control the policies of the United States and the government must be permitted to carry out its functions unhampered by judicial intervention.

Although the preceding consideration is not required in the light of the disposition made of the pending motions, the egregious problem involved and adjudged in the companion case, and the earnest and dedicated efforts of counsel for plaintiffs and amici to seek implementation of corrective efforts already in effect, impels this court to explore the putative limits of its powers and in so doing finds them effectively circumscribed.

An order has this day been entered sustaining the defendant's motion to dismiss and dismissing the complaint.

/s/ Richard B. Austin
RICHARD B. AUSTIN
Judge, United States
District Court

Dated: September 1, 1970.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1073 SEPTEMBER TERM 1970—APRIL SESSION 1971

DOROTHY GAUTREAUX, ET AL., PLAINTIFFS-APPELLANTS,

v.

GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development, DEFENDANT-APPELLEE

SEPTEMBER 10, 1971

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge* and FAIRCHILD, *Circuit Judge*.

DUFFY, *Senior Circuit Judge*. This suit is brought against the Secretary of the Department of Housing and Urban Development (HUD). Plaintiffs are all Negro tenants or applicants for public housing in the City of Chicago. They seek, on behalf of themselves and all other Negroes similarly situated, a declaration that the Secretary has "assisted in the carrying on . . . of a racially discriminatory public housing system, within the City of Chicago, Illinois." Plaintiffs further seek to enjoin the Secretary from making available to the Chicago Housing Authority any federal financial

assets to be used in connection with or in support of the racially discriminatory aspects of the Chicago public housing system. "Such other and further relief as the Court may deem just and equitable" is also requested.

Stated another way, the complaint herein challenges the role played by HUD [1] and its Secretary in the funding and construction of certain public housing in the City of Chicago. The role played by the Chicago Housing Authority (CHA), which is not a party to this suit, in the construction of the same public housing already has been held to have been racially discriminatory (*Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907 (N.D.Ill., 1969).[2] Further construction of public housing by CHA on a segregated site selection basis has been permanently enjoined. (304 F. Supp. 736). A good many of the facts pertaining to this present controversy are reported at 296 F. Supp. 907; 304 F. Supp. 736 and in this Court's decision at 436 F.2d 306 (7 Cir., 1970), cert. den. 402 U.S. 922 (1971). We shall avoid unnecessary repetition where possible.

The complaint in this case was filed simultaneously with the complaint in the *Gautreaux* v. *CHA* case, an

[1] The Department of Housing and Urban Development was created by Public Law # 89-174, enacted on September 9, 1965. All duties of the Public Housing Administration and other predecessor agencies were transferred to the authority of HUD by that law. We shall refer to HUD as both the predecessor and present agency.

[2] Because of the racial distinctions expressly found to be present in the tenant assignment and site selection practices involved in the public housing sites at issue in the CHA case and in this present suit, we do not deal with a situation such as confronted the Supreme Court in its recent decision of *James* v. *Valtierra,* 402 U.S. 137 (1971).

order of the District Court stayed all proceedings in this suit until disposition of the companion CHA case. Defendants moved to dismiss the complaint herein and filed certain affidavits and documents in support of said motion. On October 31, 1969, plaintiff moved for summary judgment under Rule 56 (F.R.C.P.) asserting that no dispute as to any material fact existed.

On September 1, 1970, the District Court entered its memorandum opinion dismissing all four counts of this complaint. Count I had been brought under the general federal question statute (28 U.S.C. § 1331) and the Fifth Amendment to the United States Constitution. It alleged that the Secretary, through his action in funding and approving CHA's racially discriminatory programs, had violated the Due Process Clause of that amendment. The Court first found that plaintiffs had standing to bring suit under all counts and that the requisite jurisdictional amount was present. The Court then concluded that "the Fifth Amendment under the circumstances here alleged [did] not authorize this suit." This ruling was a holding that there was a lack of jurisdiction to bring Count I.

Jurisdiction as to Count II was grounded on 28 U.S.C. § 1331 and 28 U.S.C. § 1343(4). Count II alleged that the Secretary's acts had violated 42 U.S.C. § 2000d (Section 601 of the Civil Rights Act of 1964). The District Court dismissed Count II for failure to state a claim upon which relief could be granted.[3] The Court's dismissal was based upon the finding that HUD's financial assistance to CHA was insufficient to

[3] Since supporting affidavits and other documents had been submitted by both parties, this should actually be treated as the grant of a motion for summary judgment. Rule 12(b), Rule 56 F.R.C.P.

make it a "joint participant" in CHA's racially discriminatory conduct.

Counts III and IV were identical with Counts I and II respectively, except that deliberate discriminatory conduct on the part of CHA had not been alleged. The District Court dismissed these counts for failure to allege such deliberate CHA action.

Finally, the Court expressed the view that the doctrine of sovereign immunity was, in part, applicable to bar this suit.

This appeal followed. The Government has abandoned both the lack of jurisdiction as to Count I and sovereign immunity as possible grounds for affirmance. Plaintiffs have not strongly contested the dismissal of Counts III and IV of the complaint. Thus, the central question presented for review reduces to whether summary judgment in favor of either party is proper on Counts I or II of the complaint. The Government argues that the District Court's grant of summary judgment in its favor is proper and advances as an additional ground for affirmance the contention that the case is now moot.

The Government's position on appeal is that this present suit is somewhat superfluous inasmuch as full and complete equitable relief has been made available to these same plaintiffs through the *Gautreaux* v. *Chicago Housing Authority* case. See: 296 F. Supp. 907; 304 F. Supp. 736. The Government is said to be in complete agreement with the "aims and objectives" of that case and that proposition is not strongly contested by the plaintiffs here.

We understand this contention by the Secretary to

bear upon only two issues: mootness, and the scope of any equitable relief which might be deemed necessary by the District Court. The second issue, the extent of possible equitable relief is extremely important, but is not before this Court on this present appeal. We deal here only with whether summary judgment in favor of either party is proper on the issue of the Secretary's alleged *liability* for events which occurred in prior years. Liability for past conduct is totally separate from the question of appropriate future relief. In deciding the liability issue, it would thus not be appropriate for us to consider the effect which the decree entered in the companion case (304 F. Supp. 736) might have in minimizing the need for an extensive decree in this suit.

Similarly, a determination of just what type of equitable remedy might be appropriate in cases of this sort is a question best left initially to the sound discretion of the District Court. *Brown* v. *Board of Education* (Brown II), 349 U.S. 294 (1955); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Even though to the writer of this opinion it might appear that extensive relief would not be necessary, we do not, in any way, wish to anticipate the District Court on an issue properly for its decision.

Thus, the only issue presently before us which might be affected by the entry of the *Gautreaux* v. *CHA* injunction is mootness. We shall consider the effect of the prior injunction as it bears on that issue.

Before turning to the issues, however, this Court wishes to state its strong support for the actions of the District Judge throughout the course of this entire

litigation. The District Judge who decided the *Gautreaux* v. *CHA* case and who has supervised the decree entered thereto, is the same District Judge who dismissed this present suit. The administration of the decree in the former case has unquestionably been a difficult and time-consuming task, presenting unique problems for resolution,[4] and generating enormous public interest. This Court would be extremely reluctant to interfere with the exercise of that District Judge's sound discretion in matters pertaining to this controversy, and no statement in this opinion should be so construed. Nevertheless, since important issues of law are presented by this appeal and since the basis of the District Court's dismissal of this present suit below seems to have been a feeling that "the putative limits [of the Court's] powers" had been "effectively circumscribed," rather than a feeling that discretion dictated the dismissal of a suit thought to be unnecessary, it is apparent that review by this Court is compelled.

JURISDICTION AS TO COUNT I.

Since courts always are free to review jurisdiction, we shall examine this point briefly even though not contested by defendant on appeal. We find jurisdiction under 28 U.S.C. § 1331 and the Fifth Amendment to be present in this case. The jurisdictional statute speaks in alternative terms with respect to the "Constitution, laws *or* treaties of the United States. . . ." [5] Thus, a

[4] For an account of at least one set of unique problems confronting the District Judge see this Court's opinion in *Gautreaux* v. *Chicago Housing Authority*, 436 F. 2d 306.

[5] The statute reads in full: "The district courts shall have

plain reading would seem to encompass a suit of this present type which directly challenges conduct alleged to have violated the Fifth Amendment. That such a reading is correct was settled by the Supreme Court in *Bell* v. *Hood*, 327 U.S. 678 (1946) where the Court held that: ". . . where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit." 327 U.S., 681-2. See also: *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Hicks* v. *Weaver*, 302 F. Supp. 619 (D.La., 1969). Jurisdiction would still exist even though we were of the opinion that no cause of action under Count I had been stated. *Bell* v. *Hood*, *supra*, at 682. Since all other requirements under 28 U.S.C. § 1331 have been met, we find that jurisdiction is present under Count I to bring a suit in equity challenging alleged racial discrimination which is said to have violated the Fifth Amendment.[6]

SOVEREIGN IMMUNITY.

Since the defendant has chosen to abandon any claim of sovereign immunity on appeal, we do not think that that point merits an extended discussion on our part. In any case, the doctrine does not bar a suit such as this which is challenging alleged unconstitutional and unauthorized conduct by a federal officer. *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Bolling* v. *Sharpe*, *supra*; *Shan-*

original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws or treaties of the United States."

[6] We agree with the District Court that the requisite jurisdictional amount has been stated.

non v. *HUD,* 436 F. 2d 809 (3 Cir., 1970). See also: *Powelton Civic Homeowners Association* v. *HUD,* 284 F. Supp. 809 (E.D.Pa., 1968); *Hicks* v. *Weaver, supra.*

MOOTNESS.

As noted previously, this appeal follows the entry of an extensive Judgment Order in *Gautreaux* v. *Chicago Housing Authority,* 304 F. Supp. 736, as modified in 436 F. 2d 306. The decree provides in part that CHA shall not ". . . seek any approval or request or accept any assistance from any government agency with respect thereto . . ." unless the plan for such assistance complies with other provisions of the Court's decree. The Secretary contends that HUD's stated full agreement with the aims and objectives of the Judgment Order, along with the issuance of an injunction against the exact practices now before us, make this present controversy moot.[7]

To some extent, the Secretary's argument is that its own voluntary promise to abide by the decision in the companion case and to stop any further racially discriminatory acts on its part is a viable ground for this Court to dismiss for mootness. We have no doubt that such assertions are offered in good faith, but we do not think that they are sufficient for us to hold this appeal moot. It long has been held that ". . . voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.,*

[7] Had the cases been consolidated and decided together, the possibility of mootness would not, of course, have arisen. Thus, in *Hicks* v. *Weaver, supra,* the Court entered an injunction against *both* the local housing authority and the Secretary of HUD.

does not make the case moot." *United States* v. *W. T. Grant,* 345 U.S. 629, 632 (1953).

A more persuasive argument is that the injunction entered in *Gautreaux* v. *CHA* renders this controversy moot since CHA is now prohibited from "accept[ing] any assistance from [HUD]" unless CHA's programs strictly comply with the specifications of the decree in that case. Thus, it is argued, a ruling here would be merely "advisory," lacking "concrete legal issues, presented in actual cases. . . ." *United Public Workers of America* v. *Mitchell,* 330 U.S. 75, 89 (1947), quoted in *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969).

We conclude, however, that the entry of the companion decree does not make this suit moot. The fact that some of the injunctive relief originally requested is no longer possible does not affect the issues presently before us. "Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests." *Powell* v. *McCormack,* 395 U.S. 486, 496, n. 8 (1969). In this suit, both declaratory and injunctive relief against construction of specific projects was originally sought. Since some of those projects now have been completed, it is obvious that full injunctive relief in favor of plaintiffs cannot now be given. But that fact does not, of itself, make this case moot. *Shannon* v. *HUD, supra,* at 822.[8] At the present time, a declaratory judgment as

[8] The *Shannon* court stated: "The defendants suggest that because the project has been completed and occupied by rent supplement tenants there is no longer any relief which may feasibly be given. The completion of the project and the creation of intervening rights of third parties does indeed present a serious problem of equitable remedies. It does not, however, make the case moot in the Article III sense. Relief can be given in some form."

well as such "other and further relief as the court may deem just and equitable" is requested.

Plaintiffs have contended that such "other and further relief" might include a more vigorous utilization of the several different types of housing programs which HUD administers in the form of a decree aimed at ". . . remedying the continuing effects of the discrimination of the past."[9] Such a decree arguably would represent an equitable remedy going beyond the scope of relief made available through the companion case and, it is contended, might facilitate the overall desired goal of desegregating the public housing sites around Chicago metropolitan area. We express no view on whether such requested relief is either necessary or appropriate. However, as long as a decree utilizing certain HUD programs still remains a possible form of relief not already available through the other case, this Court cannot deem the controversy moot. *Powell* v. *McCormack, supra.*

Moreover, even if only the declaratory judgment were demonstrated to be appropriate at this time, this Court would not necessarily be compelled to dismiss for mootness as long as the requisite "case" or "controversy" exists. "A court may grant a declaratory relief even though it chooses not to issue an injunction or mandamus. . . . A declaratory judgment can then be

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[9] For example, we are advised that "Section 236 Housing" is a low income housing program designed to increase the flow of such housing by favorable interest assistance payments to the mortgage lender. Unlike the public housing programs now before us, local governmental approval is not required for such housing to be constructed. See also: "Section 235" and "Section 231" housing programs.

used as a predicate to further relief, including an injunction." *Powell* v. *McCormack, supra,* at 499.

Contrary to the Secretary's arguments, we do not think that the controversy here has been rendered "abstract" by the injunction against CHA's further use of federal funds in a manner not in compliance with the *Gautreaux* v. *CHA* plan. A determination of whether or not the Secretary's own past conduct violated the Constitution or applicable federal statute remains very much of an open question. The entry of a declaratory judgment here would have significant consequences in determining the extent of any "further relief" deemed necessary, in the event that practices found to be discriminatory were resumed. Most important of all, the decree in the CHA case, thorough though it may be, is not binding against HUD or its Secretary.[10] Thus, at the present time, plaintiffs are in the anomalous position of having the full force of the federal judicial power at their command to enforce proven rights against CHA, yet having to rely solely on the voluntary promises of a party whose role is equally important, whose decisions pertaining to this matter may prove to be among the best means of insuring full compliance with the "aims and objectives" of the CHA decree,[11] but who never has been a party to that case or bound by its terms.

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[10] Thus this suit is unlike *Watkins* v. *CHA,* 406 F.2d 1234 (7 Cir., 1969) where reinstatement of previously evicted named plaintiffs rendered the cause moot, as between the original parties to that same case.

[11] Favorable HUD action, for example, might have been a factor in the district court's decision to modify the "best efforts" clause of the original Judgment Order in that case so as to order submission

Under such circumstances, we must conclude that the issues before us are "capable of repetition yet evading review" and that the case is not moot. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), quoted in *Moore* v. *Ogilvie,* 394 U.S. 814 (1969). Viewed another way, we are confronted here with ". . . a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden* v. *Zwickler, supra,* at 108.

WHETHER A CLAIM IS STATED UNDER THE FIFTH AMENDMENT OR SECTION 601 OF THE 1964 CIVIL RIGHTS ACT

We turn then to the merits. The Government admits that HUD approved and funded CHA-chosen regular family housing sites between 1950 and 1969, knowing that such sites were not "optimal" and that the reason for their exclusive location in black areas of Chicago was that "sites other than in the south or west side, if proposed for regular family housing, invariably encounter [ed] sufficient opposition in the [Chicago City] Council to preclude Council approval." (Letter from a Public Housing Administration Official to the Chairman of the West Side Federation, October 14, 1965).

Nevertheless, the District Court found that HUD had followed this course only after having made "numerous and consistent efforts . . . to persuade the Chicago Housing Authority to locate low-rent housing projects in white neighborhoods." That finding is not directly challenged on appeal. Moreover, given the acknowledged desperate need for public housing in Chicago,[12] HUD's decision was that it was better to fund a segregated housing system than to deny housing altogether to the thousands of needy Negro families of that city.

of approximately 1500 sites to the City Council in accordance with a specific timetable. See: 436 F.2d 306, 310.

On review of the District Court's action, we shall treat all of the above facts as true. The question then becomes whether or not, even granting that "numerous and consistent efforts" were made, HUD's knowing acquiescence in CHA's admitted discriminatory housing program violated either the Due Process Clause of the Fifth Amendment or Section 601 of the Civil Rights Act of 1964.[13] Given a previous court finding of liability against CHA (296 F. Supp. 907), the pertinent case-law compels the conclusion that both of these provisions were violated.

HUD's approval and funding of segregated CHA housing sites cannot be excused as an attempted accommodation of an admittedly urgent need for housing with the reality of community and City Council resistance. This question was argued and settled in the companion case as to these exact housing sites and the same City

[12] The Government's brief points to affidavits submitted by many of the present plaintiffs which starkly illustrate that fact. Plaintiff Gautreaux has accepted public housing in Negro areas only because she had been living in a one bedroom apartment with a family of six. Plaintiff Odell Jones had moved to segregated public housing with his wife and three children to escape their two rooms in which "the rats had begun to run over the house at will."

[13] "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

Council. The District Judge there well stated the applicable rule:

> "It is also undenied that sites for the projects which have been constructed were chosen primarily to further the praiseworthy and urgent goals of low cost housing and urban renewal. Nevertheless, a deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued." (296 F.Supp. at 914).

This court applied much the same rule in affirming a modification of the Judgment Order in the companion decision and in ordering submission of 1500 HUD approved sites to the City Council in accordance with a specific timetable. In rejecting a plea for delay, we pointed to several cases holding ". . . that 'abstention' is inappropriate in constitutional cases of this sort and that community hostility is no reason to delay enforcement of proven constitutional rights." (436 F.2d at 312.)

Courts have held that alleged good faith is no more of a defense to segregation in public housing than it is to segregation in public schools. *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907; *Kennedy Park Homes Assn.* v. *City of Lackawanna,* 436 F.2d 108 (2 Cir., 1970), cert. den. 401 U.S. 1010 (1971). Moreover, the fact that it is a *federal* agency or officer charged with an act of racial discrimination does not alter the pertinent standards, since ". . . it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling* v. *Sharpe, supra,* at 500. See also: *Green* v. *Kennedy,* 309 F. Supp. 1127, 1136 (D.C.D.C. 1970), appeal dismissed 398 U.S.

956 (1970). The reason for courts' near uniform refusal to examine purported good faith motives behind alleged discriminatory acts was, perhaps, most succinctly put by the Supreme Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725 (1963): "It is no consolation to an individual denied the equal protection of the laws that it was done in good faith."

The fact that a governmental agency might have made "numerous and consistent efforts" toward desegregation has not yet been held to negate liability for an otherwise segregated result. Thus, for example, in *Cooper* v. *Aaron,* 358 U.S. 1 (1958) the local school board admittedly had been "going forward with its preparation for desegregating the Little Rock [Arkansas] school system" (358 U.S. at 8), but was still held liable when it abandoned those plans in the face of stiff community and state governmental resistance. See also: *Watson* v. *City of Memphis,* 373 U.S. 526, 535 (1963); *Green* v. *Kennedy, supra,* at 1136.

With the foregoing considerations in mind, then, it is apparent that the "dilemma" with which the Secretary no doubt was faced and with which we are fully sympathetic, nevertheless cannot bear upon the question before us. For example, we have been advised that any further HUD pressure on CHA would have meant cutting off funds and thus stopping the flow of new housing altogether. Taking this assertion as true, still the basis of the "dilemma" boils down to community and local governmental resistance to ". . . the only constitutionally permissible state policy. . . ." *Green* v. *Kennedy, supra,* at 1137, a factor which, as discussed above, has not yet been accepted as a viable excuse for a segre-

gated result. So, even though we fully understand the Secretary's position and do not, in any way, wish to limit the exercise of his discretion in housing related matters, still we do not feel free to carve out a wholly new exception to a firmly established general rule which, for at least the last sixteen years, has governed the standards of assessing liability for discrimination on the basis of race."[14]

Turning to the facts now before us, there can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. Between 1950 and 1966 alone HUD spent nearly $350,000,000 on CHA projects. The Secretary's trial brief acknowledged that "in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance." We find no basis in the record with which to disagree with that conclusion. Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's "Annual Contributions Contract" contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone.

It also is not seriously disputed on appeal that the Secretary exercised the above described powers in a

[14] ". . . it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown* v. *Board of Education* (Brown II), *supra*, at 300.

manner which perpetuated a racially discriminatory housing system in Chicago, and that the Secretary and other HUD officials were aware of that fact. The actual aspects of that segregated system are fully described at 296 F. Supp. 907 and we shall not recount them here. The fact that HUD knew of such circumstances is borne out by the District Court's specific finding in this suit that HUD tried to block "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take." This finding is supported by, among other record items, the HUD letter to the West Side Federation previously referred to (page 15), and by the affidavit of HUD official Bergeron recalling his unsuccessful attempts in the early 1950s "to enlist [Mayor Kennelly's] assistance in having project sites located in white neighborhoods."

On such facts, and given the inapplicability of HUD's "good faith" arguments, we are unable to avoid the conclusion that the Secretary's past actions constituted racially discriminatory conduct in their own right.[15] The fact that the Secretary's exercise of his

[15] Our holding thus is not based on the "joint participation" doctrine set forth in *Burton* v. *Wilmington Parking Authority*, *supra*, and relied upon in the District Court litigation below. We need not discuss the applicability of that doctrine, for it is concerned with a different inquiry, namely, "upon identifying the requisite 'state action' ". (*Griffin* v. *Breckenridge*, 402 U.S. . . . , 39 Law Week 4691) sufficient to render admitted discrimination actionable under the Fourteenth Amendment. In any event, contrary to the Government's assertions on appeal, "joint participation" already has been "extended" to federal government operations. *Simpkins* v. *Moses T. Cone Memorial Hospital*, 323 F.2d 959 (4 Cir., 1963), cert. den. 376 U.S. 938; *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 477 (4 Cir., 1966).

powers may have more often reflected CHA's own racially discriminatory choices than it did any ill will on HUD's part, does not alter the question now before us.

We are fully sympathetic to the arguments advanced by the Government on appeal, especially, as mentioned above, to the very real "dilemma" which the Secretary faced during these years. On the other hand, against such considerations are not only the principles of law discussed heretofore, but also two recent decisions which hold against this same defendant (or predecessor) and which deal with similar facts. *Shannon* v. *HUD, supra; Hicks* v. *Weaver, supra.* We do not think we should ignore those cases.

In holding the Secretary liable on nearly identical facts as are now before us, the *Hicks* court reasoned as follows:

> "As noted above, HUD was not only aware of the situation in Bogalusa [Louisiana] but it effectively directed and controlled each and every step in the program. HUD thus sanctioned the violation of plaintiffs' rights and was an active participant since it could have halted the discrimination at any step in the program. Consequently, its own discriminatory conduct in this respect is violative of 42 U.S.C. § 2000d." (302 F. Supp. at 623).

Likewise, in *Shannon* the Third Circuit recently enjoined further action on a HUD decision to change a proposed housing project in Philadelphia from the originally contemplated owner occupied buildings to a 100% rent supplement assistance program (which was found to be the "functional equivalent of a low rent

public housing project.") (436 F.2d at 819). The *Shannon* court acknowledged that HUD was vested with broad discretion to supervise its various programs, but held, nevertheless, that ". . . that discretion must be exercised within the framework of the national policy against discrimination in federally assisted housing . . . and in favor of fair housing. . . ." (436 F.2d at 819.)

We can find no viable basis for distinguishing the *Hicks* and *Shannon* decisions. The Secretary contends that the relief requested in those two cases differed from that which is sought here. The Government's argument is entirely correct, but has no bearing on the issue of actual liability which, as mentioned previously (page 6) is the only issue now before this Court. The Government's further contention, advanced at oral argument, that *Shannon* should be distinguished as involving only a more stable integrated neighborhood trying to stave off additional public housing, is also factually correct, but legally insignificant. Such a factor might arguably affect the standing of individual plaintiffs to bring suit, but it does not alter the pertinent standard for answering the question of whether or not racial discrimination in the funding and approval of particular programs has occurred.

Finally, we emphasize, as did the *Shannon* court, that ". . . there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." (436 F.2d at 822.) However, the situation before us now *already* has been held not to constitute such a pressing case, and such is the determinative factor. Where the Court in the companion decision previously has held

that CHA's "deliberate policy to separate the races cannot be justified by the good intentions with which other laudable goals are pursued" (296 F. Supp. at 914), it is not possible with consistency to apply a lesser standard against HUD in assessing whether it too is liable for its role on the same identical facts.

So, even while we are fully sympathetic to the arguments advanced by the Secretary on appeal, we must conclude that the great weight of the caselaw favors plaintiffs' position. Since there exist no controverted issues of material fact, we conclude that summary judgment should be granted in plaintiffs' favor on both Counts I and II of the complaint. We hold that HUD, through its Secretary, violated the Due Process Clause of the Fifth Amendment (*Bolling* v. *Sharpe, supra; Hicks* v. *Weaver, supra*) and also has violated Section 601 of the Civil Rights Act of 1964 (*Shannon* v. *HUD, supra; Hicks* v. *Weaver, supra*).

In so holding we state *only* that the Secretary must be adjudged liable on these particular facts and again point out that our holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency. It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple "best efforts" clause will be necessary to remedy the wrongs which have been found to have been committed.

Such considerations, however, are not the subject for present decision, and we defer to the District Court for their resolution.

REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DOROTHY GAUTREAUX, et al., Plaintiffs, vs. GEORGE W. ROMNEY, Secretary of the Department of Housing and Urban Development, et al., Defendants.	Civil Action Nos. No. 66 C 1459 No. 66 C 1460 (Consolidated) (Filed September 11, 1973)

MEMORANDUM OPINION and JUDGMENT ORDER

The facts of these cases have often been recited and need no repetition here.* This matter comes before me today on plaintiffs' motion (1) to defer my ruling on the proposed final judgment orders submitted by HUD and plaintiffs; (2) to determine that it is necessary to consider a metropolitan plan for relief; and (3) to provide for the preparation of such plans by HUD and CHA. For the reasons stated below, that motion is denied.

Stated simply, this lawsuit attacks racial discrimination in public housing within the City of Chicago.

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* *See Gautreaux v. Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill. 1967), 296 F. Supp. 907 (N.D. Ill. 1969), 304 F. Supp. 736 (N.D. Ill. 1969, *aff'd*, 436 F.2d 306 (7th Cir. 1971); *Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); 342 F. Supp. 827, *aff'd*, Slip Opinion dated May 18, 1973 (7th Cir.).

Both defendants have previously been found liable to plaintiffs because they either fostered or tolerated the unconstitutional implementation of federal housing statutes. And, having already entered an appropriate judgment against CHA, what remains before me is the relief to be obtained from HUD.

Plaintiffs' motion asks me to consider the propriety of metropolitan area relief similar to that granted in *Bradley v. Milliken,* Slip Opinion Nos. 72-1809 and 72-1814, 42 U.S.L.W. 2022 (6th Cir. 1973), which was a case dealing with racial segregation in the Detroit public school system. But, although such relief may have been justified in *Bradley,* it is simply unwarranted here because it goes far beyond the issues of this case. Unlike education, the right to alequate housing is not constitutionally guaranteed and is a matter for the legislature. *Linasey v. Normet,* 405 U.S. 56, 74 (1972). Of course, once such legislation is enacted into law, it is constitutionally impermissible to administer it in a racially discriminatory manner. Here, for example, the evils of racial discrimination in public housing were fostered by decisions of the housing authority of the City of Chicago and tolerated by the federal agency which financed such projects.

However, the wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein. After years of seemingly interminable litigation, plaintiffs now suggest that I consider a metro-

politan plan for relief against political entities which have previously had nothing to do with this lawsuit. The factual basis for their request is an opinion of an urbanologist that by the year 2000 the entire geographic area of the City of Chicago will be within the limited public housing area as defined by the judgment order entered on July 1, 1969. This is simply inadequate to support a request to consider imposing obligations upon those who were and are incapable of discriminatory site selection within the City of Chicago.

Furthermore, plaintiffs should not have to be reminded that no public housing has been built in this City since my order of July 1, 1969 because the municipal authorities refused to approve sufficient sites for such housing and recently because of a lack of funds. But, now that one of those obstacles has been eliminated by the Seventh Circuit's recent affirmance of my order to build housing in Chicago without City Council approval, plaintiffs have curiously raised an issue that would let the principal offender, CHA, avoid the politically distasteful task before it by passing off its problems onto the suburbs.

Therefore, for the reasons stated above and in defendant HUD's memorandum of March 30, 1973, plaintiffs' motion to consider metropolitan relief is denied. Further,

A. IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That plaintiffs' motion for summary judgment on Counts I and II of the complaint in Case Number 66 C 1460 be and hereby is granted;

B. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant, George W.

Romney, Secretary of the Department of Housing and Urban Development, his successors, his officers, agents, servants, employees, representatives, and each of them shall use their best efforts to cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with:

(a) all federal statutes applicable to the low rent housing program;

(b) rules and regulations promulgated by HUD for the administration of said program; and,

(c) the provisions of the Judgment Order entered by this court in the companion case (No. 66 C 1459) on July 1, 1969, as amended, as well as all other final, non-appealable orders entered by this court from time to time in these proceedings;

C. IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the defendant George W. Romney, Secretary of the Department of Housing and Urban Development, his successors, officers, agents, servants, employees, representatives, and each of them are hereby permanently enjoined and restrained from approving and funding development programs for low rent family public housing in the City of Chicago which are inconsistent with the terms of this Judgment Order.

ENTER:

/s/ Richard B. Austin
Judge, United States District Court

DATED: September 11, 1973

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 74-1048 and 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,

v.

CHICAGO HOUSING AUTHORITY and JAMES T. LYNN, Successor to George W. Romney, Secretary of the Department of Housing and Urban Development, et al.,
Defendants-Appellees.

ARGUED JUNE 4, 1974—DECIDED AUGUST 26, 1974

Before CLARK, *Associate Justice,*[1] CUMMINGS and TONE, *Circuit Judges.*

MR. JUSTICE CLARK: Appellants, black tenants in and applicants for public housing, brought these consolidated cases separately in 1966 against the Chicago Housing Authority (CHA) and the Secretary of Housing and Urban Development (HUD) respectively, charging that CHA had intentionally violated 42 U.S.C. § 1981 and § 1982 in maintaining existing patterns of

[1] Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) is sitting by designation.

residential separation of races by its tenant assignment and site selection procedures, contrary to the Equal Protection Clause of the Fourteenth Amendment; and that HUD had "assisted in the carrying on . . . of a racially discriminatory public housing system within the City of Chicago" in violation of the Fifth Amendment. Appellants sought an injunction against CHA restraining such practices and requiring CHA to remedy the past effects of its unconstitutional site-selection and tenant-assignment procedures by building any future public housing units in predominantly white areas. This appeal grows out of the decision of the district court on remand for a determination of appropriate relief pursuant to separate findings that both CHA and HUD were responsible for *de jure* segregation in the public housing program in Chicago. In 1969 the District Court found with the appellants on the merits and since that time has devoted its efforts to effectuating this ruling. After some four years of hearings, several judgment orders and four appeals, the District Court on the last remand called on the parties to propose a "comprehensive plan" to remedy past effects of the public housing segregation indulged in by CHA and HUD, including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." HUD proposed, and the District Court, after an evidentiary hearing, ordered a plan under which HUD would "cooperate" with CHA in the latter's efforts to increase the supply of public housing units but eliminated any relief not confined to the geographic boundary of the City of Chicago and refused to impose any specific affirmative obligations upon

HUD beyond its "best efforts". 363 F. Supp. 690 (1973). The appellants contend that a metropolitan area remedial plan including housing in suburban areas, as well as those within the limits of Chicago, is necessary to remedy the past effects of said unconstitutional public housing segregation policy and attain that racial balance required by the Fourteenth Amendment. Given the eight year tortuous course of these cases, together with the findings and judgment orders of the District Court and the opinions of this Court (now numbering five), we believe the relief granted is not only much too little but also much too late in the proceedings. In effect, appellants, having won the battle back in 1969, have now lost the war. We are fully aware of the many difficult and sensitive problems that the cases have presented to the able District Judge and we applaud the care, meticulous attention and the judicious manner in which he has approached them. With his orders being ignored and frustrated as they were, he kept his cool and courageously called the hand of the recalcitrant. Perhaps in the opinion on remand on the third appeal, 457 F. 2d 124 (1972), the repetition of a statement in the opinion on remand in the second appeal, 448 F. 2d 731 that: "It may well be that the District Judge, in his wise discretion, will conclude that little equitable relief above the entry of a declaratory judgment and a simple 'best efforts' clause, will be necessary . . ." led the beleaguered District Judge to limit any plan to the boundaries of the City of Chicago and the "best efforts" of CHA and HUD. This is to be regretted and we trust that upon remand the matter will be expedited to the end that the segregated public

housing system which has resulted from the action of CHA and HUD will be disestablished, and the deficiency in the supply of dwelling units will be corrected as rapidly as possible and in the manner indicated in this opinion.

We shall not burden this opinion with the details [2] of the eight-year delay that has thus far deprived the appellants of the fruits of the District Court's judgment entered on July 1, 1969. In addition the unconstitutional action of CHA has stripped thousands of residents of the City of Chicago of their Fifth and Fourteenth Amendment rights for a score of years. Indeed, anyone reading the various opinions of the District Court and of this Court quickly discovers a callousness on the part of the appellees towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension. As far back as 1954, the District Court found that CHA had continuously refused to permit black families to reside in four public housing projects built before 1944; and that as far back as 1954 CHA has imposed a black quota on the four projects to the end that at the beginning of 1968 black tenants only occupied between 1 percent to 7 percent of the 1654 units in the projects. The non-white population of Chicago at that time was 34.4 percent. In 64 public housing sites, having 30,848 units (other than the four above mentioned), the tenants were 99 percent black. All during this period Illinois law required that CHA secure prior approval of new sites for public housing from the City Council of the City of Chicago, but the

[2] For a detailed statement of the facts see the dissenting opinion of Judge Sprecher, 457 F. 2d at 129.

District Court found that CHA set up a pre-clearance arrangement under which the alderman in whose ward a site was proposed would receive an informal request from CHA for clearance. The alderman, the Court found, to whom sites in the white neighborhoods were submitted, vetoed the sites and the City Council rejected 99½ percent of the units proposed for white sites while only 10 percent were refused in black areas. Moreover, the Court found that during this period about 90 percent of the waiting list of some 13,000 applicants to CHA for occupancy in its projects were black. These findings were neither challenged nor appealed. Furthermore, as early as July 1, 1969, a judgment order was entered herein, requiring CHA to build 700 new housing units in predominantly white areas and requiring 75 percent of all future units built by CHA to be constructed in such areas. This judgment also ran against the City Council of the City of Chicago (not then a party) on the basis of notice. Finally, CHA was directed by the District Court to "affirmatively administer its public housing system . . . to the end of disestablishing the segregated public housing system which has resulted from CHA's unconstitutional site selection and tenant assignment procedures . . . [and] use its best efforts to increase the supply of Dwelling Units as rapidly as possible . . .". 304 F. Supp. 736 (1969). No appeal was taken from this judgment.

Appellants and the District Court waited patiently for a year and a half but CHA submitted no sites for family dwellings to the City Council. The appellants contacted CHA and were advised that CHA had no intention to submit sites prior to the Chicago mayoralty election of April, 1971. The parties then asked for

and were given informal hearings, so as to prevent publicity, and finally the District Court modified its "best efforts" provision in the July 1, 1969 judgment order so as to affirmatively require CHA to submit sites for no fewer than 1500 units to the City Council for approval on or before September 20, 1970. This order was appealed by CHA and affirmed, 436 F. 2d 306, *cert. den.* 402 U.S. 922 (1971).

Meanwhile, in the separate suit against HUD filed simultaneously with the one against CHA (and now consolidated), the District Court had dismissed all four counts. On appeal this Court held that HUD had violated the due process clause of the Fifth Amendment and reversed with directions to enter a summary judgment for the appellants. This Court found that HUD had approved and funded family housing sites chosen by CHA in black areas of Chicago. HUD's explanation was "it was better to fund a segregated housing system" than deny housing altogether. This Court found that in the sixteen years (1950-1966) HUD spent nearly $350 million on such projects "in a manner which perpetuated a racially discriminatory housing system in Chicago"; that its excuse of community and local government resistance has not been accepted as viable and that this Court was "unable to avoid the conclusion that the Secretary's past actions constituted racial discriminatory conduct in their own right." *Gautreaux* v. *Romney,* 448 F.2d 731 (7th Cir. 1971).

During the progress of this litigation, HUD was conferring with the City of Chicago concerning grants under the Model Cities Program (established by the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 et seq.). A $38 million

grant was made for the calendar year 1970. However for the 1971 calendar year HUD required a "letter of intention" signed by the Mayor of Chicago, the Chairman of CHA and the Regional Administrator of HUD, indicating how Chicago's large housing deficiency would be met. Under this letter CHA was to acquire sites for 1700 units within a specified timetable. HUD approved $26 million and had released $12 million when the opinion in *Romney, supra,* came down. Appellants then sought an injunction from the District Court restraining further payments by HUD under the Model Cities Program unless and until sites in predominantly white areas for 700 dwellings units had been certified to the City Council for approval (at the time only 288 had been approved). The District Court granted this relief but on appeal the order was reversed. 457 F.2d 124 (7th Cir. 1972). On remand the District Court entered a summary judgment against HUD, consolidated the cases and entered an order calling for each of the parties to file suggestions for a "comprehensive plan" to remedy the past effects of the public housing segregation, including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago."

HUD proposed a "best efforts" judgment order under which it would "cooperate" with CHA in the latter's efforts to increase the supply of housing units in accordance with the earlier judgment order against CHA and reported in 304 F. Supp. 736. Its proposed relief was confined to the geographic boundaries of the City of Chicago. Its "best thinking" was that the letter of intention previously mentioned and signed by the Mayor, the Regional Administrator of HUD and CHA should be carried out. This letter only covered the

matter of the relocation housing deficiency of 4300 units and did not spell out any "comprehensive plan to remedy the past effects". Appellants' proposed plan provided a mechanism by which CHA could supply remedial housing in suburban areas as well as within Chicago and required HUD to administer its programs affirmatively to ensure that the order was carried out. At the hearing the appellants introduced evidence of the need for a metropolitan plan and the unreliability of HUD's "best efforts". HUD offered evidence of the lack of funds then available and CHA offered no evidence. On December 8, 1972, *Bradley* v. *Milliken,* 484 F.2d 215 (6th Cir. 1972) came down, holding that a remedial plan involving suburban school districts in the metropolitan area of Detroit was necessary to disestablish existing segregation. Appellants then requested a "*Bradley* plan" order. On September 11, 1973, the District Court sustained the HUD proposal and this appeal resulted.

1. *Scope of Review*

We agree with the appellees that the District Court did not hold that it lacked power to adopt a metropolitan plan but rather that on the facts shown such relief was unwarranted. While neither CHA nor HUD concedes that the District Court has power to require compliance with a plan that includes areas outside the official boundaries of the City of Chicago, they both conclude that the District Judge's holding was not predicated on a lack of such power. At least until *Milliken* v. *Bradley,* —— U.S. ——, 42 LW 5249, the law was clear that political subdivisions of the States may be readily bridged when necessary to vindicate

federal constitutional rights. *Ex parte Virginia,* 100 U.S. 339 (1880); *Brown* v. *Board of Education,* 349 U.S. 294, 300-301 (1954); *Board of Education* v. *Swann,* 402 U.S. 1, 27 (1971); *Griffin* v. *County Board,* 377 U.S. 218 (1964); *Bradley* v. *Milliken,* 484 F.2d 215, 250 (6th Cir. 1973); *Haney* v. *County Board,* 410 F.2d 920 (8th Cir. 1969). The equal protection clause speaks to the state, and the state cannot escape its obligations under that clause by delegating some of its governmental functions to local units. *Hall* v. *St. Helena Parish School Board,* 197 F.Supp. 649 (E.D.La. 1961), affirmed, 368 U.S. 515; *Reynolds* v. *Sims,* 377 U.S. 533, 575; *Hart* v. *Community School Board,* —— F.Supp. ——, 42 LW 2428 (E.D.N.Y. 1974). Cf. *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, 178.

We turn then to the Supreme Court's opinions in *Milliken* v. *Bradley.* That case clarifies an important equitable limitation on the substantial body of law just cited but does not overrule it. The Chief Justice's opinion for the Court assumes *arguendo* that the actions of local government are attributable to the state, 42 LW 5259, and it notes that school district lines are not sacrosanct if they conflict with the Fourteenth Amendment, 42 LW 5257. However, "[p]roceeding from . . . basic principles [of remedies]," 42 LW 5255-5256, the Court holds that metropolitan relief does not follow automatically from these premises. 42 LW 5259. Boundary lines may be "bridged," but not "casually ignored." Consolidation of 54 independent school districts would present overwhelming problems of logistics, finance, administration and political legitimacy. The Court gives great deference to the "deeply rooted" and "essential" tradition of local control of

the public schools. Unless the Michigan legislature completely restructured relevant statutes, the District Judge would become both de facto legislature and metropolitan school superintendent. 42 LW 5257. The conclusion that inter-district school desegregation is "in order" and "appropriate" only where there has been what the Court terms "an inter-district violation" (42 LW 5258) must be read in this light. Only an inter-district violation justifies incurring all the difficulties attendant on inter-district school desegregation.

This reading of the opinion is conclusively reinforced by Justice Stewart's concurrence, which expressly states the holding:

> "the Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction.
>
> . . . . .
>
> "The opinion of the Court convincingly demonstrates that traditions of local control of schools, together with the difficulty of a judicial supervised restructuring of the local administration of schools, render improper and inequitable such an inter-district response to a constitutional violation found to have occurred only within a single school district." 42 LW 5260-5261 (citation omitted).

Justice Stewart's view is pivotal because his vote makes a majority when added to any of the other opinions. It is also significant that the Chief Justice's opinion does not indicate any disagreement with Justice Stewart's understanding.

Milliken v. *Bradley* therefore fits into an established

line of precedent. Beginning in *Brown I,* the Court recognized that remedial complexities may limit or delay implementation of the constitutional right to school desegregation. 347 U.S. 483, 495. In *Brown II,* the Court emphasized local school problems, and in a passage quoted by both the Chief Justice and Justice Stewart in *Milliken,* reminded that "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." 349 U.S. 294, 300. Long experience in reconciling practical problems with demands for total desegregation eventually resulted in the following rule:

> "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Comm'rs,* 402 U.S. 33, 37.

An alternative phrasing is the requirement "that all reasonable methods be available to formulate an effective remedy." *North Carolina State Board of Education* v. *Swann,* 402 U.S. 43, 46. We understand *Milliken* v. *Bradley* to hold that the relief sought there would be an impractical and unreasonable over-response to a violation limited to one school district.

In view of the dominant theme of the majority opinion as a whole, the fact that any application of the opinion to factual situations other than the one before the Court would be dictum, and particularly in view of Justice Stewart's opinion for the fifth vote, we conclude

that the majority opinion in *Milliken* v. *Bradley* deals with equitable limitations on remedies.

Our task therefore, and that of the District Judge, is to determine how great a degree of public housing desegregation is practical. *Milliken* v. *Bradley* dealt only with schools. Public housing may be quite different; indeed, both the Chief Justice's and Justice Stewart's opinions implied that the result as to schools might be different if housing discrimination were shown. 42 LW 5253, n. 7; 42 LW 5261. Compare *Watson* v. *City of Memphis,* 373 U.S. 526, 532-534, holding that because

> "[d]esegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, . . . it is patent . . . that the principles enunciated in the second *Brown* decision have absolutely no application [to parks]."

2. *A Metropolitan Plan is Necessary and Equitable*

After careful consideration and reflection we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan area basis. This could entail additional time but not under proper management since the intra-city portion of the plan may proceed without any further delay. In the meanwhile the suburban or metropolitan phases of the plan can be perfected (new parties, if necessary, etc.) and effectuated without delaying or interfering with the intra-city phase of the comprehensive plan. There are

only five housing authorities (in addition to CHA) involved, and while voluntary cooperation is not indicated, a Court order directing that those not volunteering were to be made parties might help. On the record here we are not able to discuss—much less pass upon—the validity of any specific metropolitan plan. We leave that for the district court on remand.

Our decision in regard to the necessity and equity of suburban or metropolitan area action is predicated on the following:

The equitable factors which prevented metropolitan relief in *Milliken* v. *Bradley* are simply not present here. There is no deeply rooted tradition of local control of public housing; rather, public housing is a federally supervised program with early roots in federal statutes. See 42 U.S.C. § 1401 *et seq.; Gautreaux* v. *Romney,* 448 F.2d 731, 737-740 (7th Cir. 1971). There has been a federal statutory commitment to non-discrimination in housing for more than a century, 42 U.S.C. § 1982, and the Secretary of HUD is directed to administer housing programs "in a manner affirmatively to further the policies" of non-discrimination, 42 U.S.C. § 3608(d)(5). In short, federal involvement is pervasive.

Similarly, the administrative problems of building public housing outside Chicago are not remotely comparable to the problems of daily bussing thousands of children to schools in other districts run by other local governments. CHA and HUD can build housing much like any other landowner, and whatever problems arise would be insignificant compared to restructuring school systems as proposed in *Milliken* v. *Bradley*.

In *Milliken* v. *Bradley,* the Chief Justice emphasized

that there was no evidence of discrimination by the suburban school districts affected. Here, although the record was not made with the Supreme Court's *Milliken* opinions in mind, there is evidence of suburban discrimination. Plaintiff's Exhibit 11 indicates that of twelve suburban public housing projects, ten were located in or adjacent to overwhelmingly black census tracts. And although the case was not limited to public housing, it is not irrelevant that we recently took judicial notice of widespread residential segregation "in Chicago and its environs." *Clark* v. *Universal Builders, Inc.*, —— F.2d —— (7th Cir. No. 72-1655, 1974) slip op. 15. We went on to hold that a prima facie showing had been made that this segregation had discriminatory effects throughout the metropolitan area.

Finally, the possibility of metropolitan relief has been under consideration for a long time in this case. While they disagree as to what relief the District Court should order, the parties are in agreement that the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work.

The HUD General Counsel is quoted as saying:

> "The provisions in State housing authorities laws which authorize a city housing authority to operate . . . in a county or other city with the consent of the governing body concerned, were included in these laws because it was realized that many cities would have to utilize the areas outside their borders in meeting their low-rent housing needs. It was recognized that the elimination of slums and the provision of decent housing for

> families of low income in the locality are matters of metropolitan area scope but of primary concern to the central city because the problem and impact are intensified there. In effect, therefore, the State legislatures have determined that the city and its surrounding area comprise a single 'locality' for low-rent housing purposes." (Pls.' Exh. 13, pp. 3-4).

Likewise, an applicable HUD regulation states in part: "[H]ousing market areas often are independent of arbitrary political boundaries . . .". (Pls.' Exh. 16, p. 1).

And CHA itself in a memorandum of December 21, 1971, (Record Doc. 167 at p. 27) said:

> "CHA fully agrees that public housing must be metropolitan in nature, and not confined to the City of Chicago. It has so stated on numerous occasions before this court. It has offered testimony that a dispersal program for public housing will not work unless it is operated on a metropolitan basis."

HUD has taken a similar position:

> "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. The City and the suburbs together make up what I call the 'real city.' To solve problems of the 'real city,' *only metropolitan-wide solutions will do.*" (Statement by Secretary Romney, Appendix Z, pp. 15-16, to HUD's Memorandum, De-

cember 17, 1971, Record Doc. 283, Attachment 6, Memorandum 2, p. 2, emphasis added.)

And Samuel J. Simmons, former Assistant Secretary for Equal Opportunity of HUD, said:

> Central cities are losing Whites and gaining Blacks. In spite of a gradual increase in the number of Blacks and other minorities living in the suburbs, the fact of the White noose around the country's largest cities is a largely unchanged reality. The White trek to the suburbs has continued unabated in the last ten years and in the majority of the large metropolitan areas White and Blacks still live largely separate lives . . . *It is impossible to solve central city problems in the central city alone.*" (Pls.' Exh. 7, pp. 3-4, emphasis added.)

In fact, HUD joined the appellants in a joint representation to the District Judge that "the parties are of the view that a metropolitan remedy is desirable." Tr. pp. 4, 6, Feb. 22, 1972. While it later said: "it is by no means clear" that a metropolitan remedy is necessary, it reaffirmed subsequently "the desirability of a metropolitan wide plan" and explained that its previous statement was only raising "various legal objections to the particular plan plaintiffs have proposed . . ." Tr. Rec. Doc. 310 p. 7-10 HUD Memorandum.

In addition to CHA's and HUD's strong, positive statements as to the necessity for a metropolitan plan here, the appellants also offered the testimony of a recognized demographer who estimated that a continuance of present trends in black and white census tracts

would lead to at least a 30 percent black occupancy in every census tract in Chicago by the year 2000. The District Judge himself added support to this thesis; however his prediction was 1984:

> "[E]xisting patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions." (296 F. Supp. 907, 915).

If this prediction comes true it will mean that there will be no "general Public Housing Area" left in Chicago on which CHA could build desegregated public housing. In the ten-year period 1960-1970 the population of the City of Chicago declined by 183,000 people, a decrease of 505,000 whites and an increase of 322,000 blacks. The expert demographer further testified that by providing desegregated housing opportunities in the suburban areas, the rate of white exodus from the city would diminish. There was no testimony to the contrary. In fact "White flight" has brought on the same condition in most of our metropolitan cities, such as Indianapolis, Indiana. See *United States* v. *Board of School Commissioners,* 332 F. Supp. 655, 676 (1971); also as to Atlanta, Georgia; *Calhoun* v. *Cook,* 332 F. Supp. 804, 805 (1971). Like conditions—but aggravated—exist in Washington, D. C. and Cleveland, Ohio.

The realities of "White flight" to the suburbs and

the inevitability of "resegregation" by rebuilding the ghettos as CHA and HUD were doing in Chicago must therefore be considered in drawing a comprehensive plan. The trial judge back in 1969 ordered scattered-site, low-rise housing—despite much criticism—but the experts now agree that such requirements are mandatory. His warning that "By 1984 it may be too late to heal racial divisions", rather than a cliche, is a solemn warning as to the interaction of "White flight" and "black concentration". It is the most serious domestic problem facing America today. As Assistant Secretary Simmons further advises:

> "As Whites have left the cities, jobs have left with them. After 1960, three-fifths of all new industrial plants constructed in this country were outside of central cities. In some cases as much as 85% of all new industrial plants located outside central cities were inaccessible to Blacks and other minorities who swelled ghetto populations." (Pls.' Exh. 9, p. 3).

These words also convey a solemn warning, *i.e.*, we must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos and thereby forever trap them in the vicious cycle of poverty which can only lead them to lives of crime and violence.

By way of concluding, we have carefully read the records in these cases and find no evidence that the suburban or metropolitan area should not be included in a comprehensive plan. All of the parties, the Government officials, the documentary evidence, the sole expert and the decided cases agree that a suburban or metropolitan area plan is the *sine qua non* of an effective remedy. In fact the Judge himself recognized its

importance in his original judgment order by authorizing housing units to be provided in suburban Cook County on a voluntary basis. See 304 F. Supp. at 739. Furthermore, in his order of December 23, 1971, calling for the preparation by the parties of a "comprehensive plan", he wisely included the following paragraph:

> "3. In the preparation of such plan or plans, the parties are requested to provide the Court with as broad a range of alternatives as seem to the parties feasible as a partial or complete remedy for such past effects, including, if the parties deem it necessary or appropriate to provide full relief, alternatives which are not confined in their scope to the geographic boundary of the City of Chicago."

In light of all of these considerations we can but conclude that the District Court's finding as to not including in a comprehensive plan of relief areas outside the City of Chicago, *i.e.*, the suburban or metropolitan area, was clearly erroneous.

3. *Action on Remand*

The judgment order of September 11, 1973, is reversed and the causes are remanded for further consideration in the light of this opinion, to wit: the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago which has resulted from CHA's and HUD's unconstitutional site selection and tenant assignment procedures but will increase the supply of dwelling units as rapidly as possible.

It is so ordered.

TONE, *Circuit Judge,* dissenting.

I respectfully dissent based on my reading of the majority decision in *Milliken* v. *Bradley,* ——U.S. ——, 42 U.S.L.W. 5249 (July 25, 1974). I recognize that that case involved facts significantly different from those in the case at bar, but the "controlling principle" stated and applied there seems to me to be applicable here. That principle is that the remedy must be commensurate with the constitutional violation found, and, therefore, an inter-district remedy is not justified unless the evidence shows an inter-district violation. (42 U.S.L.W. at 5258 and 5261.) This seems to me to preclude metropolitan relief here. No violation outside the city has even been alleged, let alone proved, as the District Court pointed out. *Compare, United States* v. *Board of School Comm. of the City of Indianapolis,* —— F.2d —— (7th Cir. August 21, 1974), Slip Op. at 14-17, 27.

I do not disagree with this court's persuasive argument that a metropolitan plan is needed to reduce segregation in the metropolitan area. The record does not support that relief in this case, however, in view of the stricture of *Milliken* v. *Bradley.*

APPENDIX E

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
September 30, 1974

Before

Hon. TOM C. CLARK, Associate Justice[1]
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

Nos. 74-1048, 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,

vs.

CHICAGO HOUSING AUTHORITY and
JAMES T. LYNN, Etc., et al.,
Defendants-Appellees.

ORDER
On Rehearing

On rehearing, we reaffirm our view that the trial judge should not have refused to "consider the propriety of metropolitan area relief." His conclusion

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[1] Associate Justice Tom C. Clark of the Supreme Court of the United States (Ret.) is sitting by designation.

that the only factual basis for plaintiffs' request was the opinion of an urbanologist ignores much of the record and, in particular, the statements of the parties themselves to the effect that "only metropolitan-wide solutions will do."

The requested relief does not go "far beyond the issues of this case," as the trial judge suggests. Rather, it is reasonable to conclude from the record [2] that defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the "white flight" phenomenon which has exacerbated the problems of achieving integration to such an extent that intra-city relief alone will not suffice to remedy the constitutional injuries. The extra-city impact of defendants' intra-city discrimination appears to be profound and far-reaching and has affected the housing patterns of hundreds of thousands of people throughout the Chicago metropolitan region.

[2] The trial judge himself made the following statement in his 1969 opinion in this matter:

"Two further results of CHA's participation in a policy of maintaining existing patterns of residential separation of the races must be mentioned. First, as Dr. Baron's Affidavit discloses, the 188,000 White families eligible for public housing have understandably chosen in the main to forego their opportunity to obtain low cost housing rather than to move into all Negro projects in all Negro neighborhoods. This is an ironic but predictable result of a segregationist policy of protecting Whites from less than half as many (76,000) eligible Negro families. Second, existing patterns of racial separation must be reversed if there is to be a chance of averting the desperately intensifying division of Whites and Negroes in Chicago. On the basis of present trends of Negro residential concentration and of Negro migration into and White migration out of the central city, the President's Commission on Civil Disorders estimates that Chicago will become 50% Negro by 1984. By 1984 it may be too late to heal racial divisions." *Gautreaux* v. *Chicago Housing Authority,* 296 F. Supp. 907, 915 (N.D. Ill. 1969).

It is in this sense, we believe, that the Supreme Court requires a showing that "there has been a constitutional violation within one district that produces a significant segregative effect in another district." *Milliken* v. *Bradley,* 42 U.S.L.W. at 5258. We therefore reaffirm our remanding of this case for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken* v. *Bradley.* In the meantime, intra-city relief should proceed apace without further delay.

A majority of the judges in regular active service not having requested that a vote be taken on the suggestion for an *en banc* rehearing, and a majority of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the appellees for a rehearing in the above-entitled appeal be, and the same is hereby denied.

Judge Tone adheres to his prior dissent.

APPENDIX F

UNITED STATES COURT OF APPEALS
for the Seventh Circuit
Chicago, Illinois 60604
August 26, 1974

Before
Hon. TOM C. CLARK, Associate Justice *
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

No. 74-1048, 74-1049

DOROTHY GAUTREAUX, et al.,
Plaintiffs-Appellants,
vs.
CHICAGO HOUSING AUTHORITY, etc., et al.,
Defendants-Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of September 11, 1973, of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further consideration in accordance with the opinion of this Court filed this day.

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* Associate Justice Tom C. Clark of the Supreme Court of the United States is sitting by designation.

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Supreme Court, U. S.
FILED
APR 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1047

JAMES T. LYNN, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT, Petitioner

v.

DOROTHY GAUTREAUX, ET. AL.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

MOTION OF THE HOUSING AUTHORITY OF ELGIN ILLINOIS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Amicus Curiae

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

JAMES T. LYNN, SECRETARY OF HOUSING
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MOTION

Pursuant to Rule 42 of the United States Supreme Court, the Housing Authority of Elgin, Illinois respectfully moves this court for leave to file a brief in this case as amicus curiae. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein refused to consent to the filing of a brief by the Housing Authority of Elgin, Illinois as amicus curiae.

The applicant, Housing Authority of Elgin, Illinois has an interest in this case because it is one of the governmental entities which the plaintiffs have determined should be held responsible for implementing a court-ordered plan of metropolitan-wide remedial relief. In March, 1975, almost nine years after initiation of these consolidated actions, the Housing Authority of Elgin, Illinois was served with Summons and Plaintiffs' Amended Complaint, thereby being made a party defendant to the district court action. Unless the opinion of the Seventh Circuit is reversed, the Housing

Authority of Elgin, inter alia, will be charged with carrying out the Gautreaux decree.

The government's petition for a writ of certiorari argues that in light of Milliken v. Bradley, it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation. While the amicus joins fully in the arguments presented in the appellant's petition, the amicus believes that the U. S. Department of Housing and Urban Development and local housing authorities such as the Housing Authority of Elgin have different, although complementing, perspectives on the relevance of the Milliken v. Bradley decision to the Gautreaux facts. The petitioner is quite rightly concerned over the effect of the court's decision on the Secretary's responsibility for administering HUD programs not only in the Chicago urbanized area, but nationwide. The amicus, however, is particularly concerned by the fact that the appellate court, in reversing the district court, held that an inter-district constitutional violation had occurred which called for, indeed demanded, an inter-district remedy. This finding was reached by the appellate court without affording the amicus, and similarly situated housing authorities, with notice and an opportunity to be heard. If the appellate court's decision is not reversed, the amicus will be held responsible for implementing a remedial decree without ever having been permitted to present evidence and respond to plaintiffs' allegation of an inter-district wrong.

Additionally, the Seventh Circuit attempted to distinguish the Milliken decision on the basis that the administrative problems of an inter-district housing remedy were not "remotely comparable" to the problems of cross-district busing, and that HUD and local housing authorities can build housing "much like any other landowner". In fact the petitioner builds no housing at all. Under the statutory scheme mandated by the Housing Act of 1937, HUD provides the financial resources to local housing authorities for construction of public housing.

As HUD is a financier rather than a builder of public housing, the amicus would be in a far better position than the petitioner to advise the court of both the legal and administrative difficulties which are sure to arise from the imposition of an inter-district housing remedy.

Finally the amicus wishes to bring to the court's attention the appellate court's holding that HUD violated the Fifth Amendment and Title VI of the Civil Rights Act of 1964, 42 USC 2000d, because HUD "knowingly acquiesced in CHA's admitted discriminatory housing program."

The holding of the Appellate Court that the HUD Secretary's failure to terminate funding violates the Fifth Amendment places HUD in an impossible dilemma. If HUD engages in conciliation and negotiation, it complies with Title VI but violates the Fifth Amendment. If HUD terminates funding, its actions are consistent with its constitutional obligation, but it violates Title VI. The court's solution to that dilemma represented error, for it constituted a holding by implication that the procedure mandated by Title VI was unconstitutional.

As complaints of discriminatory conduct by a federally funded housing authority (such as the appellate court's finding of inter-district violation in this case) are to be investigated and processed by the funding agency under the regulations and procedures demanded by Title VI, it is as important to local housing authorities as it is to HUD to know whether the procedure mandated by Title VI is constitutional.

Wherefore, the Housing Authority of Elgin, respectfully requests the Court to permit them to file an amicus curiae brief.

Respectfully submitted

Frederick J. Steffen

Attorney for Amicus Curiae

Supreme Court, U. S.
FILED
NOV 8 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner

—*v.*—

DOROTHY GAUTREAUX, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 20, 1975
CERTIORARI GRANTED MAY 12, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner

—*v.*—

DOROTHY GAUTREAUX, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
In the United States District Court for the Northern District of Illinois:	
Relevant Docket Entries	1
Complaint	26
Suggestion on Record of Death	40
Excerpt from Deposition of Joseph Burstein	41
Affidavit of Don Morrow	44
Order Consolidating Cases	49
Order to Prepare Comprehensive Plan	50
Motion and Order to Add Parties and to File Supplemental Complaint	51
Excerpt from Transcript of February 22, 1972	61
Excerpt from Transcript of July 24, 1972	66
Plaintiffs' Proposed Judgment Order	77
Excerpt from Transcript of September 28, 1972	87
Philip M. Hauser	
Direct	87
Cross	94

In the United States District Court for the Northern District of Illinois:—Continued Page

Excerpt from Transcript of November 27, 1972 110
Philip M. Hauser
Direct 123
Cross 131
Redirect 143
Plaintiffs' Exhibit 11—Housing Authorities and Projects in the Chicago Urbanized Area 144
Plaintiffs' Exhibit 18—Letter of Intent 148
Excerpt from Transcript of November 28, 1972 159
Martin E. Sloane
Direct 159
Cross 186
Redirect 194
Excerpt from Transcript of November 29, 1972 196
Plaintiffs' Motion and Proposed Order Deferring Ruling on Final Judgment 202
CHA Report No. 14 208
Order Adding Parties and Granting Leave to File Second Supplemental Complaint 211
Second Supplemental Complaint 213
Recommendation of Special Master 220
Order re Recommendation of Special Master 221
In the United States Supreme Court (No. 74-1047):
Order Granting Petition for a Writ of Certiorari 223

RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 66 C 1460

DATE	FILINGS—PROCEEDINGS
8-9-66	Filed Complaint
	* * * *
11-9-66	Filed Stipulation
11-9-66	Filed Amendment to Complaint
11-9-66	Enter Order to Amend Complaint and serve summons on new defendant. AUSTIN, J.
	* * * *
12-20-66	Filed Motion of Defendant to Dismiss (to Judge Austin)
	* * * *
1-3-67	Filed Memorandum and Affidavits in support of Defendant's Motion to Dismiss (to Judge Austin)
	* * * *
2-3-67	Filed Notice of Motion
2-3-67	Filed supplemental memo in support of defendant's motion to dismiss
2-3-67	Enter order on motion of defendant, leave to file supplemental memorandum instanter in support of his motion to dismiss—Austin, J.
	* * * *
4-24-67	Filed Notice
4-24-67	Filed Defendant's second supplemental memorandum in support of motion to dismiss
	* * * *
5-9-67	Filed Motion of plaintiffs to consolidate and Memorandum of Authorities in support (to Judge Austin)
5-9-67	Filed Brief of plaintiffs in opposition to motion of defendant to dismiss (to Judge Austin)
	* * * *

DATE	FILINGS—PROCEEDINGS

6-8-67 Enter order on motion of defendant leave to file his reply memorandum and exhibits instanter by agreement with plaintiffs—Austin, J.

* * * *

6-8-67 Filed Defendants' reply memorandum and Exhibits

6-16-67 Filed Notice

6-16-67 Filed Motion of Defendant to defer the taking of certain deposition etc.

6-16-67 Motion of defendant to defer the taking by plaintiffs of the deposition of defendant's employee Marie McGuire until after the ruling by the Court on the pending motion to dismiss argued and advisement and ruling deferred until June 29, 1967-Austin, J.

6-19-67 All proceedings herein are stayed and cause is continued generally, etc.—DRAFT—Austin, J.

6-21-67 Filed Motion for leave to submit memorandum, Memorandum in support of (a) Plaintiffs' request to take deposition and (b) Plaintiffs' request for oral argument and Notice

6-21-67 Enter order leave to submit Memorandum and Advisement—Austin, J.

10-31-69 Filed Plaintiffs' motion for summary judgment and brief in support thereof

10-31-69 Enter order leave to file motion for summary judgment related motions and supporting brief instanter and for an order granting defendant until January 5, 1970 to respond thereto—Austin, J.

12-4-69 Filed Motion of Amici Curiae for leave to file brief in support of plaintiffs' Motion for Summary Judgment.

12-4-69 Leave to Lawyers Committee for Civil Rights, etc., et al. Metropolitan Housing & Planning and Urban Law Institute to file Motions for leave to file briefs as amici curiae and hearing on said motions continued to December 9, 1969. AUSTIN, J.

DATE	FILINGS—PROCEEDINGS

12-9-69 Filed Brief of Urban Law Institute, etc., et al. amici curiae in support of plaintiffs' motion for summary judgment

12-9-69 Filed Brief of Metropolitan Housing and Planning Counsel amicus curiae in support of plaintiffs' motion for summary judgment

12-9-69 Filed Brief of Lawyers Committee for Civil Rights, etc. amici curiae in support of plaintiffs' motion for summary judgment

12-9-69 Motions of Lawyers Committee for Civil Rights et al. for leave to file briefs as amici curiae granted—Austin, J.

1-8-70 Filed Defendants' answer in support of motion to dismiss and in opposition to motion for summary judgment

1-8-70 Enter order on motion of defendant leave to file instanter, without objection by plaintiffs, defendant's answer in support of his pending motion to dismiss and in opposition to plaintiffs' motion for summary judgment and supporting exhibits—Austin, J.

1-14-70 Enter order on motion of plaintiffs leave to file reply brief on or before March 2, 1970—Austin, J.

1-26-70 Filed Notice

1-26-70 Filed Index pertinent to portions of Exhibit "H" to defendant's answer to motion for summary judgment

1-26-70 Enter order on motion of defendant for leave to file instanter an index to pertinent portions of Exhibit "H" to defendant's answer to motion for summary judgment and additional pages to that exhibit—Austin, J.

* * * *

3-6-70 Filed Notice

3-6-70 Filed Motion of League of Women Voters of Illinois to join as Amicus Curiae

DATE	FILINGS—PROCEEDINGS

3-6-70 Enter order motion of League of Women Voters of Illinois to join amicus curiae brief of Metropolitan Housing and Planning Council granted—DRAFT—Austin, J.

3-13-70 Filed Motion of Leadership Council for Metropolitan Open Communities to join as Amicus Curiae

3-13-70 Enter order leave to join Amicus in Brief submitted by Metropolitan Housing & Planning Council—DRAFT—Austin, J.

3-13-70 Filed Notice of Motion

3-13-70 Filed Motion of Urban Affairs Committee for leave to file brief

3-13-70 Enter order leave to file amicus curiae brief on behalf of Urban Affairs Committee Chicago Bar Association and leave to defendant to respond in 10-days—Austin, J.

3-13-70 Filed Plaintiffs' Reply Brief in support of Motion for Summary Judgment

3-13-70 Filed Brief of Urban Affairs Committee as amicus curiae in support of the constitutional rights asserted by plaintiffs

4-15-70 Filed Notice of Motion

4-15-70 Order motion of defendant Romney for leave to file instanter additional Affidavit of Don Morrow in support of defendant's motion to dismiss and its reply brief to brief of amicus, Chicago Bar Association, entered and continued to April 30, 1970 before Judge Austin—Robson, J.

* * * *

4-30-70 Filed Affidavit of Don Morrow in support of defendant's motion to dismiss

4-30-70 Filed Reply of defendant to amicus curiae Brief filed by Urban Affairs Committee, Chicago Bar Assn.

DATE	FILINGS—PROCEEDINGS

5-5-70 Filed Plaintiffs' Brief responding to Reply of Defendant to Brief

6-12-70 Filed notice.

6-12-70 Filed affidavit of Don Morrow in further support of motion to dismiss and/or for summary judgment.

6-12-70 Enter order on motion defendant leave to file instanter third affidavit of Don Morrow in further support of defendant's pending motion to dismiss or for summary judgment.—Austin, J.

9-1-70 Filed memorandum.

9-1-70 Pursuant to the Court's memo filed this day defendant's motion to dismiss is sustained and the complaint is dismissed.—Austin, J.

10-21-70 For the reasons given in the Court's memo dated September 1, 1970, this action is dismissed—DRAFT—Austin, J.

10-29-70 Filed Notice of Appeal by Plaintiffs

10-29-70 Delivered copy of Notice of Appeal to U.S. Attorney

* * * *

1-6-71 Filed Request for complete Record

1-27-71 Transmitted Complete Record on Appeal to U.S.C.A. (Items 20 and 52 of Index transmitted unbound for convenience)

9-17-71 Filed motion of plaintiffs' pursuant to Rule 62(c) of the Rules of Civil Procedure for the U.S. District Court and Rule 8(a) of the Federal Rules of Appellate Procedure for an order to preserve the status quo pending a hearing.

9-17-71 Cause continued to September 21, 1971, for hearing on plaintiffs' motion filed September 17, 1971.—Austin, J.

9-20-71 Filed memorandum in opposition to plaintiffs' motion pursuant to Rule 62(c) FRCP and Rule 8(a) FRAP for an order to preserve the status quo pending a hearing.

DATE	FILINGS—PROCEEDINGS

9-20-71 Filed Motion of City of Chicago for leave to intervene with respect to plaintiffs' motion for an order to preserve the status quo pending hearing.

9-20-71 Filed affidavit of Erwin A. France

9-20-71 Filed objections of City of Chicago to plaintiffs' motion to preserve status quo pending hearing.

9-20-71 Filed memorandum of Chicago Housing Authority in opposition to plaintiffs' Rule 62(c) motion for injunction.

9-20-71 Filed government's objections to plaintiffs' motion to preserve status quo pending hearing.

9-21-71 Filed City of Chicago's notice of filing.

9-21-71 Filed petition of Central Advisory council to intervene.

9-21-71 Motion of Central Advisory Council for leave to intervene herein as party defendant is granted.—Austin, J.

9-20-71 Filed objections of Sec. of H.U.D. to plaintiffs' motion pursuant to Rule 62(C) F.R.C.P. and Rule 8(a) FRAP for an order to preserve the status quo pending a hearing.

* * * *

9-21-71 Opening statement heard. Plaintiffs' evidence heard in part—Hearing adjourned to September 22, 1971.—Leave to Attorney Kenneth K. Howell to participate in this hearing under certain restrictions.—Austin, J.

9-22-71 Further evidence heard for plaintiffs—plaintiffs rest—Motion of defendants for finding taken under advisement—Defendants' evidence heard in part—Hearing adjourned to September 23, 1971.—Austin, J.

9-23-71 Further evidence heard for defendants—Defendant City of Chicago rests.—Motion of defendant City of Chicago to strike taken under advisement. Further evidence heard for co-defendants—Hearing adjourned to September 24, 1971.—Austin, J.

DATE	FILINGS—PROCEEDINGS

9-24-71 Filed Affidavits submitted by CHA in opposition to plaintiffs' Rule 62(c) Motion for injunction. Affidavits of Harry J. Schneider, Barbara Bell and Thomas L. Flemming.

9-24-71 Further evidence heard for defendants—Government rests—Further evidence heard for defendants.—Defendant C.H.A. rests—Further evidence heard for defendants—Chicago Advisory Council rests—All parties rest—Arguments heard and concluded—Cause taken under advisement—Decision deferred to October 1, 1971, at 10 a.m. Leave to C.H.A. and City of Chicago to intervene as parties defendant for the purpose of this hearing. —Austin, J.

10-1-71 Filed Government's memorandum in opposition to plaintiffs' motion for consolidation. (Filed in 71 C 2291)

10-1-71 Filed Memorandum opinion of Judge Austin

10-1-71 Enter injunction order (DRAFT)—Austin, J.

10-7-71 Clerk's File Copy of transcript of proceedings had before Judge Austin on September 21, 22, 23, 24 and October 1, 1971, filed by Official Court Reporter. (5 vols)

10-12-71 Filed plaintiffs' exhibits 1—16; HUD exhibit 1; CHA exhibits 1, 2, 4-7; City of Chicago exhibits 1, 2, 3.

10-13-71 Filed notice of appeal by City of Chicago, intervenor.

10-13-71 Filed notice of appeal by Central Advisory Council, intervenor.

10-13-71 Filed notice of appeal by Chicago Housing Authority, intervenor.

10-13-71 Mailed copies of notices of appeals to attorneys of record.

10-13-71 Filed designation of record on appeal by City of Chicago.

DATE	FILINGS—PROCEEDINGS

10-13-71 Certified and transmitted to U.S.C.A., 7th Circuit, complete record on appeal (from 9-17-71 to 10-13-71) consisting of one volume of pleadings, and under separate certificate 5 volumes of transcripts of proceedings and one envelope of exhibits.

10-22-71 Clerk's File Copy of transcript of proceedings had before Judge Austin on September 17, 1971, filed by Official Court Reporter.

10-26-71 Transmitted supplement to record on appeal transmitted on October 13, 1971. (Transcript of proceedings had on September 17, 1971)

11-1-71 Filed certified copy of order from U.S.C.A. to wit: IT IS ORDERED by the Court that said emergency motion be and the same is hereby denied. IT IS FURTHER ORDERED that this appeal be expedited. Intervenors-appellants' briefs shall be filed on or before November 12, 1971, plaintiffs-appellees' brief shall be filed on or before November 26, 1971, and intervenors-appellants' reply brief shall be filed on or before December 8, 1971. IT IS FURTHER ORDERED these appeals be set down for oral argument on Friday, December 10, 1971.

11-11-71 Filed Plaintiffs' motion for order pending final judgment.

11-11-71 Enter Order (DRAFT) pending Final Judgment.—Austin, J.

11-11-71 Leave to Chicago Housing Authority, City of Chicago and Central Advisory Council to intervene herein and said intervention is limited to Count 2 of the complaint.—Austin, J.

11-11-71 Filed Opinion

DATE	FILINGS—PROCEEDINGS

11-11-71 Filed Mandate U.S.C.A. order entered on October 21, 1970, U.S.D.C. is hereby REMANDED. It is further ordered that each party to this appeal shall pay their own costs. and AFTERWARDS TO WIT, an order was entered on November 11, 1971, directing that the mandate issue forthwith to the U.S.D.C.

11-11-71 Received record on appeal from U.S.C.A., 7th Circuit (1 volume pleadings, 1 vol. Memorandum and affidavits.)

11-11-71 Filed certified copy of order from U.S.C.A. to wit: IT IS ORDERED that the objections to the motion to issue mandate be overuled and that the order of this Court heretofore entered on November 2, 1971, be terminated and the Clerk is authorized and directed to issue the mandate forthwith.

11-12-71 Filed Notice of Appeal by City of Chicago.

11-21-71 Mailed copy of Notice of Appeal to Alexander Polikoff and U. S. Attorney

11-12-71 Filed Designation for Short Record

11-12-71 Transmitted Short Record on Appeal to U.S.C.A. consisting of Two (2) Orders entered 11-11-71 and Notice of Appeal filed 11-12-71. Designation for short record and docket entries

11-12-71 Mailed copy of letter and certificate to Alexander Polikoff and Richard L. Curry.

11-23-71 Filed Government's memorandum in support of motion to consolidate and motion to alter or amend the judgment order entered November 11, 1971.

11-24-71 Filed Government's notice of motion

11-24-71 Paragraph 5 of defendant's motion to alter or amend the Court's order entered November 11, 1971 is withdrawn—Paragraph 6 of said motion is denied—Paragraphs 1 thru 4 of said motion are denied.—Austin, J.

DATE	FILINGS—PROCEEDINGS

11-24-71 Filed Plaintiffs' Motion for further relief.

11-24-71 Filed Government's Notice

11-24-71 There being no objection by plaintiffs or by defendants the government's motion to consolidate cases 66 C 1469 and 66 C 1460 is granted.—Austin, J.

11-26-71 Enter order consolidating cases numbered 6 C 1459 and 66 C 1460. (DRAFT)—Austin, J.

11-26-71 Enter order requiring defendant Romney to file certain response and memorandum (DRAFT)—Austin, J.

12-1-71 Filed supplemental memorandum in support of plaintiffs' motion for further relief against the Chicago Housing Authority.

12-2-71 Filed Government's Notice of Appeal
Mailed copies of Notice of Appeal to Alexander Polikoff, Richard L. Curry, H. Ernest Lafontant, Patrick W. O'Brien

12-17-71 Filed Government's notice

12-17-71 Filed Government's motion for leave of court to file its memorandum in opposition to plaintiffs' motion for further relief instanter.

12-17-71 Filed Memorandum in opposition to plaintiffs' motion to require defendant to propose comprehensive plans, etc.

12-17-71 Motion for leave of court for defendant, George W. Romney, to file his memorandum in opposition to plaintiffs' motion for further relief instanter, granted (DRAFT) Consolidated cause continued to December 23, 1971, for hearing.—Austin, J.

12-21-71 Filed Memorandum of Chicago Housing Authority in answer to Plaintiffs' motion for further relief as to CHA, Affidavit of C. E. Humphrey, in support of memorandum of Chicago Housing Authority in answer to Plaintiffs' motion for further relief as to CHA. Exhibit A.

DATE	FILINGS—PROCEEDINGS

12-23-71 Arguments heard—Enter order requiring the parties to attempt to formulate a comprehensive plan, etc. (DRAFT)—Austin, J.

12-28-71 Clerk's file copy of transcript of proceedings had on November 11, 1971, before Judge Richard B. Austin filed by the Official Court Reporter.

12-28-71 Clerk's file copy of Transcript of Proceedings had on November 24, 1971, before Judge Austin filed by the Official Court Reporter.

12-29-71 Filed Plaintiffs' notice

12-29-71 Filed Reply memorandum in support of plaintiffs' motion for further relief against CHA.

12-30-71 Filed Report No. 3 to the Court pursuant to order of April 16, 1971.

1-3-72 Arguments heard—Enter order requiring CHA to file certain plans on or before certain dates and setting hearing on each of said plans. (DRAFT)—Austin, J. See draft for particulars

1-18-72 Filed Response of CHA to Part I of the order entered upon CHA on January 3, 1972, with attachments 1 and 2

2-2-72 Filed Plaintiffs' motion to add parties defendant and to file supplemental complaint.

2-2-72 Filed supplemental complaint

2-2-72 Leave to plaintiffs to file supplemental complaint adding parties defendant, etc. (DRAFT)—Austin, J.

2-2-72 No hearing on consideration of Plan No. 1—no Order. —Austin, J.

2-2-72 Issued 50 summons and 50 copies with 50 copies of supplemental complaint and order to Attorney for special process (Henry McMorris—Appointed) per order of above.

DATE	FILINGS—PROCEEDINGS

2-16-72 Filed Answer of CHA to supplemental complaint (in 66 C 1459)

* * * *

2-22-72 Filed answer of George W. Romney, Secretary of Housing and Urban Development, defendant to supplemental complaint.

2-22-72 Filed Appearance of William Cousins, Jr., Leon M. Despres, Anna R. Langford, Dick Simpson and William S. Singer, as defendants and that of Alex Elson, as attorney.

* * * *

2-22-72 Filed answer of Defendants, William Cousins, Jr., Leon M. Despres, Anna R. Langford, Dick Simpson and William S. Singer, to supplemental complaint.

2-22-72 Filed Notice of filing answer of the City of Chicago and Richard J. Daley with exhibits attached.

2-22-72 Filed answer of defendants, City of Chicago and Richard J. Daley, to supplemental complaint with exhibits A, B and C attached.

2-22-72 Filed Exhibit D to defendant, City of Chicago's answer. (Above items in 66 C 1459)

* * * *

2-23-72 Filed appearance of Claude W. B. Holman, Jimmy L. Washington, David Rhodes, Eugene Ray and Robert Biggs, as defendants and attorney.

* * * *

2-23-72 Filed appearance of Robert S. Fiffer, Allan N. Lasky and Joel L. Widman, as attorneys for Paul T. Wigoda, defendant.

* * * *

2-23-72 Filed appearance pro se of Marilou Hedlund.

2-23-72 Filed appearance of Jack I. Sperling and attorney

2-23-72 Filed Defendant Jack I. Sperling's notice of motion; Motion to dismiss and copy.

DATE	FILINGS—PROCEEDINGS

2-23-72 Filed Defendants Claude W. B. Holman, Jimmy L. Washington, David Rhodes, Eugene Ray and Robert Biggs' notice of motion; Motion to dismiss and copy.

2-23-72 Filed Defendant Michael Bilandic's notice of motion; Motion to dismiss.

2-25-72 Filed appearance of Michael Bilandic as defendant and attorney

2-28-72 Filed appearance of defendants, Edwin P. Fifielski and Thomas F. Patrick and that of their attorney, with Affidavit under Rule 39.

2-28-72 Filed Answer of defendants, Edwin P. Fifielski and Thomas F. Fitzpatrick

2-28-72 Filed defendants, Jack I. Sperling and Michael Bilandic's Motion to Dismiss and Notice of Motion.

2-28-72 Filed defendants, Jack I. Sperling and Michael Bilandic's Notice of Motion, Memorandum in support of Motion to Dismiss. (above items filed 2-28-72 located in 66 C 1459)

3-3-72 Filed Motion of Seymour Simon for leave to appear pro se and to file answer to supplemental complaint.

3-3-72 Filed answer of Defendant Seymour Simon to supplemental complaint.

3-3-72 Enter order leave for Seymour Simon to appear pro se and file answer to the supplemental complaint in the above cause instanter.—Austin, J.

3-3-72 Filed answer of Defendants Wilson Frost, William H. Shannon, Tyrone T. Kenner, Eugene Sawyer, Clifford P. Kelley and Bennett M. Stewart.
(all further documents entered on 66 C 1459—consolidated with above case.)

DATE	FILINGS—PROCEEDINGS

5-4-72 Filed opinion

5-4-72 Filed Mandate: U.S.C.A. 7th Circuit—It is ordered and adjudged that these appeals from the order of District Court entered on October 1, 1971, are hereby dismissed, with costs for reason of mootness and afterwards to wit, a petition for rehearing en banc filed on March 22, 1972; on April 26, 1972, an order was entered denying the petition for rehearing en banc. Re appeal by Chicago Housing Authority, intervening Defendant-Appellant

5-4-72 Filed Opinion

5-4-72 Filed Mandate: U.S.C.A. 7th Circuit—Re appeal by the City of Chicago Intervenor-Defendant; It is ordered and adjudged by this Court that these apepals from the order of the said District Court entered therein on October 1, 1972, be and the same are hereby dismissed, with costs, for reason of mootness, and afterwards to wit, a petition for rehearing en banc was filed on March 22, 1972; on April 26, 1972, an order was entered denying the petition for rehearing en banc.

5-4-72 Filed Opinion

5-4-72 Filed Mandate: U.S.C.A. 7th Circuit: re Appeal by Central Advisory Council, Intervening Defendant-Appellant; It is ordered that these appeals from the order of said District Court entered on October 1, 1971 be and the same are hereby dismissed, with costs, for reason of mootness, and afterwards to wit, a petition for rehearing en banc was filed on March 22, 1972; on April 26, 1972, an order was entered denying the petition for rehearing en banc.
Re: orders entered 10/1/71, 10/1/71 and 9/10/71.

5-4-72 Received complete record from U.S.C.A. consisting of 1 vol. of pleadings, 5 vol. transcripts and 1 folder of exhibits.

5-4-72 Filed opinion

DATE	FILINGS—PROCEEDINGS

5-4-72 Filed Mandate: U.S.C.A., 7th circuit re appeal by the City of Chicago, the Central Advisory Counsel and the Chicago Housing Authority, intervenor-Defendants-Appellants. It is ordered and adjudged that the judgment of said District Court in this cause appealed from be, and the same is hereby reversed, with costs, and this cause be and the same is hereby remanded to the said District Court for proceedings not inconsistent with the opinion of this Court filed this day, and afterwards to wit, a petition for rehearing en banc was filed on March 22, 1972; on April 26, 1972 an order was entered denying the petition for rehearing en banc and further that City of Chicago, Central Advisory Council & CHA, intervenor Defendants-Appellants recover against the Dorothy Gautreaux, et al., plaintiff-Appellees the sum of $25.00 for their cost. (Re: order entered on 11/11/71)

5-4-72 Received short record on appeal from U.S.C.A. 7th Circuit.

5-10-72 Filed Notice of Appeal by Richard L. Curry, Corporation Counsel for 40 defendants.

5-10-72 Filed Notice of Appeal by Richard L. Curry, Corporation counsel, for City of Chicago, and Mayor Daley.

5-10-72 Filed Notice of Appeal by Lawrence Hickey, Attorney for Edward R. Vrdolyak.

5-11-72 Mailed copies of docket sheets and notice of appeal to all attorneys of record.

5-25-72 Transmitted short emergency record consisting of docket entries, notices of appeal from City Chicago, et al. and certain defendants (2) and orders of April 10, 1972, and April 20, 1972.

5-26-72 Filed certified copy of order from U.S.C.A., 7th Circuit: It is ordered that said motion to suspend the order of April 10, 1972, be and the same is hereby denied.

6-1-72 Filed documents pursuant to order of Court, May 8, 1972. List of sites.

DATE	FILINGS—PROCEEDINGS

6-19-72 Filed documents pursuant to order of April 10, 1972. List of sites.

* * * *

8-3-72 Clerk's file copy of transcript of proceedings had on May 28, 1972, before Judge Austin, filed by an official court reporter.

8-7-72 Filed Chicago Housing Authority's filing of documents pursuant to order of Court.

8-11-72 Filed Notice by U.S. Attorney

8-11-72 Filed Petition by U.S. Attorney

8-11-72 Enter order petition to transfer case No. 72 C 1197 to the Executive Committee in accordance with rule 10 B 4 (c) (ii) so that said case can be placed on the calendar of the Honorable Richard B. Austin entered and continued to September 11, 1972, at 10 a.m. before Judge Hoffman.

9-25-72 Filed Plaintiffs' proposed judgment order and memorandum.

10-5-72 Clerk's file copy of transcript of proceedings had on July 24, 1972, and August 7, 1972, before Judge Austin, filed by an official court reporter. (2 volumes)

10-6-72 Filed Report No. 6 to the Court pursuant to order of April 16, 1971.

* * * *

11-17-72 Filed Answer to Interrogatories by Martin Rogan, Deputy Director, Chicago Area Office

11-27-72 Opening statements heard. Plaintiffs' evidence heard in part. Hearing adjourned to November 28, 1972. AUSTIN, J.

11-28-72 Further evidence heard for plaintiffs. Hearing adjourned to November 29, 1972. AUSTIN, J.

DATE	FILINGS—PROCEEDINGS

11-29-72 Further evidence heard. Parties rest. Arguments heard and concluded Advisement. Leave to plaintiffs to present proposed findings of fact and conclusions of law in 30 days. Leave to the parties to file any memoranda they desire to file in 30 days. Leave to C.H.A. to file any responses to anything filed by any of the other parties in 5 days after said filing. AUSTIN, J.

12-7-72 Clerk's file copy of transcript of proceedings had on September 28 and 29, 1972, October 11 and 12, 1972, before Judge Austin, filed by an official court reporter. 3 volumes

* * * *

12-29-72 Filed report No. 7 to the Court pursuant to order of April 16, 1971, by defendants.

1-29-73 Filed Plaintiffs' motion to defer ruling on certain proposed final judgment orders, etc., and brief in support thereof

2-1-73 Enter order on motion of CHA order allowing it to file its written response to the various papers filed by plaintiffs and HUD under this Court's order of November 29, 1972, within five days after HUD files its papers under said order. AUSTIN, J.

* * * *

3-30-73 Filed Memorandum in opposition to plaintiffs' motion for a ruling on the propriety of considering metropolitan relief and in support of the entry of federal defendants' proposed judgment order.

3-30-73 Filed Report No. 8 to the Court pursuant to order of April 16, 1971.

4-4-73 Filed Notice of Motion

4-4-73 Filed Motion

4-4-73 Enter order on defendant's motion, leave to substitute defendant Schneider as Executive Director of Chicago Housing Authority. AUSTIN, J.

DATE	FILINGS—PROCEEDINGS

4-4-73 Filed Notice

4-4-73 Filed Motion

4-4-73 Enter order on motion of defendant James T. Lynn, Secretary of the Department of Housing and Urban Development, leave of Court to file his memorandum in opposition to plaintiffs' motion for a ruling on the propriety of considering metropolitan relief and in support of the entry of federal defendant's proposed judgment order, which is 16 pages in length, and said motion entered nunc pro tunc as of March 30, 1973 (DRAFT) AUSTIN, J.

4-18-73 Clerk's file copy of transcript of proceedings had on November 27, 1972, November 28, 1972, November 29, 1972, and February 2, 1973, before Judge Austin, filed by an official court reporter. 4 volumes

* * * *

4-30-73 Filed reply to HUD memo in opposition to plaintiffs' motion for a ruling.

6-29-73 Filed Report No. 9 to the Court pursuant to order of April 16, 1971 submitted by Harry J. Schneider.

6-8-73 Filed Mandate from the U.S. Court of Appeals, judgment returned Affirmed.

6-8-73 Filed Opinion.

6-8-73 Received letter from the U.S.C.A. stating that the record will be returned upon completion of companion cases.

* * * *

7-30-73 Received the following from the U.S. Court of Appeals, 1 volume of pleadings, 1 envelope exhibits, short record and physical exhibits.

8-1-73 Received the following from the U.S. Court of Appeals; 4 volumes of transcripts and 1 Binder of data sheets.

DATE	FILINGS—PROCEEDINGS

9-11-73 Motion of plaintiffs to consider metropolitan relief is denied and motion to defer ruling on proposed final judgment orders, etc., denied. Plaintiffs' motion for summary judgment on Counts I and II of complaint in 66 C 1460 is granted. Enter permanent injunction against defendant George W. Romney, etc., et al. (DRAFT) AUSTIN, J.

10-1-73 Filed notice of filing; Report No. 10 to the Court pursuant to order of April 16, 1971.

11-9-73 Filed Notice of Appeal by the Plaintiffs.

11-13-73 Filed Notice of (Cross) Appeal by the United States Attorney.

11-23-73 Mailed copy of the notice of appeal (both appeals mailed) to all the parties of record.

11-16-73 Received the answer of defendant from the U.S. Court of Appeals. (1 volume)

12-7-73 Filed Designation for Complete Record on Appeal.

* * * *

1-14-74 Certified and transmitted to the U.S.C.A.—7th Circuit, the complete record on appeal. Together with 9 volumes of transcripts of proceedings.

1-14-74 Mailed copies of the appeals list to all attorneys of record.

1-2-74 Filed Notice of Filing with CHA Report #11 to the Court filed Pursuant to Order of April 16, 1971. (in 66 C 1459)

2-14-74 Filed Plaintiffs' motion to require defendants to report to court.

2-14-74 Motion for order to report to court taken under advisement-Leave to the defendants to respond in 30 days and cause is continued to March 14, 1974 for hearing. Austin, J. (in 66 C 1459)

* * * *

DATE	FILINGS—PROCEEDINGS

4-1-74 Filed notice of filing with CHA #12 to the Court filed pursuant to order of April 16, 1971. (in 66 C 1459)

4-2-74 Plaintiffs' motion for order on defendant to report taken under advisement. Leave to the plaintiffs to file supporting brief in 7 days and leave to the defendant to file responses thereto in 15 days thereafter and leave to the plaintiffs to reply in 5 days thereafter. Cause continued to May 10, 1974, for status report. Austin, J. (in 66 C 1459)

4-8-74 Filed brief in support of plaintiffs' motion for hearing.

4-23-74 Filed defendant's brief in opposition to the plaintiffs' motion for hearing.

5-1-74 Filed defendant's notice of motion.

5-1-74 Filed defendant's motion for leave to file rejoinder to the plaintiffs' reply, instanter.

5-1-74 Federal defendant's motion for leave to file rejoinder to the plaintiffs' reply instanter, granted. Austin, J.

5-1-74 Filed federal defendant's rejoinder in opposition of the plaintiffs' motion for hearing. (all the above in 66 C 1459)

5-6-74 For reasons of judicial economy and expediency and to avoid delays, plaintiffs' motion for a hearing is denied. Plaintiffs are granted 45 days in which to conduct discovery relative to the issued raised in the motion for a hearing. Plaintiffs are granted 20 days thereafter to file motions or other papers. Defendants are granted 20 days thereafter to answer. Plaintiffs are granted an additional 10 days to reply to the defendants' answer. This matter is taken off the status report for May 10, 1974, and set for ruling and/or status report on the September passed case calendar. Austin, J. (in 66 C 1459)

5-23-74 Filed defendant's notice of motion.

DATE	FILINGS—PROCEEDINGS

5-23-74 Filed defendant's motion to quash notice of deposition.

5-23-74 Federal defendant's motion to quash notice of deposition argued and denied. Austin, J.

7-1-74 Filed notice of filing with Report No. 13 to the Court re CHA activities.

7-12-74 Filed Plaintiffs' report to the Court pursuant to order of May 6, 1974.

7-31-74 Filed federal defendant's response to the plaintiffs' report pursuant to order of May 6, 1974. (in 66 C 1459)

* * * *

9-11-74 Enter order dated September 10, 1974: Leave to plaintiffs to tender proposed order September 11, 1974, and leave to defendants to file Objections thereto on or before September 23, 1974. Austin, J.

9-23-74 Filed Federal Defendant's response and objections to plaintiffs' proposed order submitted pursuant to Court's order of September 10, 1974 (in 66 C 1459)

9-30-74 Filed notice of filing with Report #14 to the Court pursuant to order of April 16, 1971 attached.

10-8-74 Enter order dated October 7, 1974: The parties are granted until October 23, 1974, to endeavor to agree upon an order expediting their performance of the July 1, 1969, order, to file additional names of proposed commissioners, or each to file a proposed new order with briefs in support thereof. Hearing is set for November 1, 1974: Austin, J.

10-8-74 Filed opinion.

10-8-74 Filed certified from U.S.C.A.—7th Circuit: dated August 26, 1974, cause is reversed with costs and remanded to district court for further consideration.

10-8-74 Filed order from the U.S.C.A.—7th Circuit: dated September 30, 1974: Order that the petition of appellees for rehearing is DENIED.

DATE	FILINGS—PROCEEDINGS

10-8-74 Received complete record from U.S.C.A. (all documents).
(all the above in 66 C 1459)

* * * *

11-5-74 Filed appearance of Chicago Housing Authority and that of its counsel Steven M. Rasher of Mayer, Brown & Platt (In 66 C 1459)

* * * *

11-5-74 Filed Plaintiffs' comments on proposed order of reference (In 66 C 1459)

11-7-74 Enter order dated 11-6-74: Argument heard and cause taken under advisement.—AUSTIN, J (In 66 C 1459)

11-7-74 Enter order dated 11-7-74: Plaintiffs' motion to appoint a commissioner granted as modified. Matter referred to a Master-Magistrate according to the rules. (Draft)—AUSTIN, J. (to Magistrate JURCO) (in 66 C 1459)

11-21-74 Enter Order dated November 19, 1974: Status report held. Set for pretrial conference Tuesday, November 26, 1974, at 2:30 p.m.—Jurco, Magistrate

12-31-74 Filed notice of filing with Report #15 to the Court on CHA activities attached.

2-7-75 Filed plaintiffs' notice.

2-7-75 Filed plaintiffs' motion to add parties defendant and to file supplemental complaint; second supplemental complaint.

2-7-75 Filed plaintiffs' motion to modify order of reference.

2-12-75 Enter order dated February 7, 1975; Motion to modify order of reference and motion to add parties defendant and to file supplemental complaint taken under advisement. Cause continued to February 13, 1975, for a status report with regard to motion to modify order of reference and status report with regard to motion to file supplemental complaint scheduled for February 24, 1975.—AUSTIN, J. (in 66 C 1459)

DATE	FILINGS—PROCEEDINGS

2-24-75 Filed defendant Chicago Housing Authority's motion to vacate reference order of November 7, 1974.

2-24-75 Filed plaintiffs' notice to add parties defendant and to file supplemental complaint and plaintiffs' motion to modify order of reference.

2-25-75 Enter order dated February 24, 1975; Motion to modify reference to magistrate and motion to vacate said reference denied. Plaintiffs' motion for leave to file supplemental complaint granted and leave to answer or plead to same in 30 days. (Draft)—AUSTIN, J.

3-5-75 Issued fourteen summons and fourteen copies with fourteen copies of complaint.

2-4-75 Filed Opinion from the United States Court of Appeals denying petition for writ of mandamus.

3-19-75 Filed summons returned served as to Frank A. Kirk, Illinois Housing Development Authority, Housing Authority of Cook County and Dupage County Housing Authority. (4 returns)

3-21-75 Filed appearance of counsel for defendant Housing Authority of the County of Cook; affidavit Larry Selander, James T. Otis and Kenneth R. Mischner (3 affidavits)

3-26-75 Filed answer of defendant James T. Lynn, Secretary of Housing and Urban Development to plaintiffs' second supplemental complaint.

3-26-75 Filed summons returned served as to Housing Authority of North Chicago, Waukegan Housing Authority and Housing Authority of the County of Lake. (3 returns)

3-26-75 Filed appearance of counsel for defendant Illinois Housing Development Authority.

3-26-75 Filed answer of Chicago Housing Authority and Harry B. Schneider to second supplemental complaint.

* * * *

DATE	FILINGS—PROCEEDINGS

3-31-75 Filed notice of filing; report no. 16 to the Court pursuant to order of April 16, 1971.

* * * *

4-3-75 Filed appearance of counsel for defendant Waukegan Housing Authority.

4-3-75 Filed appearance of counsel for defendant Housing Authority of the City of North Chicago.

4-3-75 Filed appearance of counsel for defendant Housing Authority of the County of Lake.

4-10-75 Issued summons and one copy with one copy of complaint (second supplemental) as to Maywood Housing Authority.

4-9-75 Filed summons returned served as to Housing Authority of the Village of Oak Park, Aurora Land Clearance Commission and Housing Authority of Elgin. (3 returns)

4-9-75 Filed summons returned unexecuted as to Maywood Housing Authority.

* * * *

4-18-75 Filed Notice of filing appearance on behalf of defendant, Housing Authority of the Village of Oak Park.

4-18-75 Filed appearance of the Housing Authority of the Village of Oak Park, and that of Klein, Thorpe, Kasson and Jenkins as attorneys with affidavit of Patrick A. Lucansky, pursuant to General Rule 39.

* * * *

4-23-75 Filed summons returned served as to Maywood Housing Authority and Housing Authority of Joliet. (2)

4-24-75 Filed answer of Aurora Land Clearance Commission to second supplemental complaint.

* * * *

DATE	FILINGS—PROCEEDINGS

5-5-75 Filed answer of Housing Authority of the City of North Chicago to the second supplemental complaint.

* * * *

5-6-75 Filed Recommendation of Master.

5-8-75 Enter order dated May 5, 1975; The judgment order entered herein on September 11, 1973, and the judgment order entered on July 1, 1969, as amended, shall not be interpreted to preclude Housing and Urban Development from approving a Housing Assistance Plan filed with it by the City of Chicago pursuant to the Housing and Community Development Act of 1974. (see draft for full particulars) (Draft)—AUSTIN, J.

5-7-75 Filed answer of the Housing Authority of the Village of Oak Park to second supplemental complaint.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Civil Action No. 66 C 1460]

[Filed August 9, 1966]

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA JOHNSON, JAMES RODGERS AND ROBERT M. FAIRFAX, PLAINTIFFS

v.

THE HOUSING ASSISTANCE ADMINISTRATION, A Corporate Agency of the Department of Housing and Urban Development, DEFENDANT

COMPLAINT

COUNT I

1. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1331. This is an action in equity seeking declaratory relief under Title 28, U.S.C. §§ 2201 and 2202 and an injunction. The rights sought to be secured in this action are rights guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States. The matter in controversy exceeds, exclusive of interest and costs, the value of $10,000.

2. This is a proceeding for a declaration that the defendant has assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago, Illinois, for a permanent injunction enjoining the defendant from continuing to assist in the carrying on of the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3. Plaintiffs are all Negro citizens of the United States who presently reside in the City of Chicago, Illinois, and are tenants in "regular family" public housing projects (i.e., projects for persons other than the elderly) operated by the Chicago Housing Authority (the "Authority"), or have filed, on forms provided for by the Authority, written applications for and are eligible to be housed in, and have a right in accordance with Authority Rules to be housed in, such projects.

4. Plaintiffs bring this action pursuant to Rule 23 of the Federal Rules of Civil Procedure on their behalf and on behalf of all other Negro tenants and applicants similarly situated. The members of the class on whose behalf this suit is brought are so numerous that joinder of all members is impracticable. There are questions of law and fact involved common to the class, the claims of the plaintiffs as representative parties are typical of the claims of the class, and the plaintiffs as representative parties will fairly and adequately protect the interests of the class. The prosecution of separate actions by individual members of the class would create a risk of (A) inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the defendants, and (B) adjudications with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests. Defendant has acted, in all respects stated herein, on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

5. Defendant, the Housing Assistance Administration, is a corporate agency and instrumentality of the United States and is a constituent agency of the Department of the Executive Branch of the Government of the United States known as the Department of Housing and Urban Development. Defendant was formerly known as the Public Housing Administration.

6. The Authority is a municipal corporation, organized and existing under the laws of the State of Illinois, with its principal office located in the City of Chicago, Illinois. The public housing facilities in the City of

Chicago are under the jurisdiction, management and control of the Authority. Under the laws of the State of Illinois, the Authority has the power and the duty to engage in low-rent housing projects, which activity is declared by such laws to be a governmental function essential to the public interest.

7. Under the laws of the State of Illinois the Authority has the power and the duty to select and acquire real property as sites for regular family public housing projects in the City of Chicago, but such sites, when selected by the Authority, may not be acquired by it until the Authority has advised the City Council of the City of Chicago (the "City Council") of the description of the sites proposed to be acquired and the City Council has approved the acquisition thereof by the Authority. The statute of the State of Illinois which requires such approval by the City Council (Ill. Rev. Stats., Ch. 67½, § 9) was enacted and became effective in 1949.

8. During the period from 1950 to the present, the applicants for and tenants of regular family public housing projects of the Authority have been predominantly Negro. At present, approximately 93% of the applicants for regular family public housing projects whose names appear on the Authority's waiting list therefor are Negro, and approximately 90% of the tenants in such projects are Negro.

9. With respect to residence the City of Chicago is, and continuously since 1950 has been, highly segregated along racial lines. At the time of the filing of this Complaint, Negroes numbering approximately 1,000,000 persons constituted over 25% of the total population of Chicago. At such time over 85% of all Negroes living in Chicago resided in neighborhoods the racial composition of which was all Negroes or substantially all Negro (hereinafter "Negro neighborhoods"). During the entire period from 1950 to the present, over 75% of all Negroes living in Chicago resided in Negro neighborhoods. Such Negro neighborhoods were and are predominantly large and contiguous, and not small and scattered, and they constitute compact, segregated areas of Negro residence the bulk of which is known as the Negro Ghetto.

10. Such large scale residential segregation of Negroes within the Negro Ghetto in Chicago has had and will continue to have highly detrimental effects upon Negroes living therein, including the following:

(a) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located generate, among Negro residents thereof, feelings of inferiority as to their status in the community that affect their hearts and minds in a way unlikely ever to be undone. The separation of the races is usually interpreted as denoting the inferiority of the Negro group, and the sense of inferiority thus imparted to residents of the Negro Ghetto detrimentally affects their motivation and their ability to become useful members of the society at large, and has a tendency to retard their educational, social and political development. Such feelings of inferiority and other detrimental effects have been and are produced by the Negro Ghetto in Chicago.

(b) Physical isolation from and lack of social contact with the larger predominantly white community within which the Negro Ghetto is located results, and has resulted in Chicago, in a pervasive life pattern of pathology marked by ignorance, fear, racial misunderstanding, broken homes, illegitimacy, delinquency, drug addiction, hatred and violence, all of which cripples and destroys great numbers of persons living within the Negro Ghetto.

(c) Segregation in education invariably occurs where Negroes are residentially segregated and such educational segregation has occurred in Chicago and has followed the geographic pattern of the residential segregation hereinabove referred to. At the time of the filing of this Complaint approximately 90% of the Negroes attending elementary schools and approximately 70% of the Negroes attending high schools in Chicago attended seg-

regated Negro schools—i.e., schools which were all Negro or substantially all Negro. Such educational segregation is harmful to children attending such schools, generates feelings of inferiority as to their status in the community that affects their hearts and minds in a way unlikely ever to be undone, results in inferior education for such children, and detrimentally affects their motivations and their ability to become useful adult members of the society at large.

(d) As is stated in Executive Order No. 11063 of the President of the United States, "discriminatory policies and practices result in segregated patterns of housing and necessarily produce other forms of discrimination and segregation which deprive many Americans of equal opportunity in the exercise of their inalienable rights to life, liberty and the pursuit of happiness." The Negro Ghetto in Chicago is one such segregated pattern, has produced and continues now to produce such other forms of discrimination and segregation and has caused and continues now to cause such deprivation of opportunity to the residents thereof.

11. Since 1950 and prior to April 7, 1965, numerous sites were selected by the Authority, approved by the City Council, and acquired by the Authority for the purpose of erecting regular family public housing projects thereon. Following such acquisition the Authority erected regular family public housing projects on such sites consisting of hundreds of dwelling units and housing thousands of tenants, and the Authority presently maintains and operates the same.

12. Substantially all of said numerous sites selected for regular family public housing projects by the Authority and approved by the City Council since 1950 and prior to April 7, 1965, were in neighborhoods which were at the time of such selection, and are now, Negro neighborhoods, and were and are within the areas known as the Negro Ghetto.

13. Prior to April 7, 1965, the Authority selected and on or shortly prior to April 7, 1965, the City Council approved sites for the following described proposed new regular family public housing projects:

1. Project 2-12, Washtenaw & 12th Place, 201 dwelling units.
2. Project 2-27, Adams and Wood Avenues, 105 dwelling units.
3. Project 2-28, Six Scattered Sites, 241 dwelling units.
4. Project 2-32, 43rd and Princeton, 444 dwelling units.

In addition, prior to April 7, 1965 the Authority selected Project 2-33, Pershing Road and Cottage Grove Avenue, for expansion, involving the construction of 606 additional dwelling units at or adjacent to the site of such project. Said proposed projects and the proposed expansion of Project 2-33 are hereinafter collectively referred to as the "Five Proposed Projects." Each of the sites for the Five Proposed Projects is in a neighborhood which was at the time of selection and is now a Negro neighborhood, and was and is within the areas known as the Negro Ghetto.

14. The Five Proposed Projects are large scale public housing projects designed and intended to provide in the aggregate approximately 1,600 new dwelling units for the housing of thousands of public housing tenants as follows:

2—15 story buildings	1—13 story building
1—14 story building	1—10 story building
4—8 story buildings	22—3 story buildings
5—7 story buildings	1—2 story building

Construction of the Five Proposed Projects has not yet begun.

15. In 1966 the Authority selected and submitted to the City Council for approval twelve additional sites for twelve proposed additional regular family public housing projects, designed and intended to provide in the aggregate approximately 1,300 dwelling units for the

housing of thousands of public housing tenants. Eleven of the sites for said twelve proposed projects (hereinafter collectively referred to as the "Twelve Proposed Projects") are located in the Woodlawn, Oakwood, Lawndale and East Garfield Park areas of Chicago, and the twelfth site is located at 118th Street and Wood Avenue. On or about July 11, 1966, the City Council approved 11 of such sites. Each of the sites for the Twelve Proposed Projects is in a neighborhood which was at the time of selection and is now a Negro neighborhood, and was and is within the areas known as the Negro Ghetto.

16. Since 1950 substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto because the Authority has deliberately chosen sites for such projects which would avoid the placement of Negro families in white neighborhoods. After 1949 the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods, because the Authority deliberately determined not to submit any sites for City Council approval of regular family public housing projects which would result in the placement of Negro families in white neighborhoods.

17. The Authority deliberately chose Negro neighborhoods for each of the sites for the Five Proposed Projects and for the Twelve Proposed Projects to avoid the placement of Negro families in white neighborhoods.

18. The effect of the selection of sites by the Authority in Negro neighborhoods upon Negro applicants for and tenants of regular family public housing projects has been and continues to be that:

(a) Such applicants and tenants, if they choose to live in Authority's public housing facilities at all, have been and are forced to reside within the Negro Ghetto in the City of Chicago, and have been and are denied the opportunity to reside in public housing facilities in white neighborhoods;

(b) Existing patterns of Negro residential and school segregation in the City of Chicago have been and are continued and strengthened and the detrimental effects and evil consequences of such segregation, all as alleged in Paragraph 10 hereof, are enlarged and imposed upon such applicants and tenants; and

(c) The impact of such detrimental effects and evil consequences, as alleged in paragraph 10 hereof, upon such applicants and tenants, is the greater because, by reason of the site selection policies hereinabove described, such impact appears to have the force and sanction of law.

19. By reason of the facts hereinabove alleged, construction of the Five Proposed Projects and of the Twelve Proposed Projects on the sites selected therefor, and perpetuation thereby of Authority's racially discriminatory public housing system, (a) will force plaintiffs and the class they represent to live exclusively in Negro neighborhoods within the Negro Ghetto if they choose to live in Authority's public housing facilities at all, (b) will preclude plaintiffs and the class they represent from having the opportunity to reside in public housing facilities in white neighborhoods, and (c) will continue and strengthen existing patterns of residential and school segregation in the City of Chicago and impose the evil consequences thereof, all as alleged in paragraph 10 hereof, upon plaintiffs and the class they represent.

20. The Authority has applied to the defendant for, has received from the defendant, and has employed Federal financial assistance in the construction of and otherwise in support of the numerous regular family public housing projects referred to in paragraph 11 hereof. The Authority has applied to the defendant for, either has received or shortly will receive from the defendant, and will continue thereafter to receive Federal financial assistance for the proposed construction of and otherwise in support of the Five Proposed Projects. Annual contributions contracts pursuant to which such assistance in

the future will be provided have been executed by or on behalf of the Authority and the defendant in connection with each of the Five Proposed Projects. The Authority has applied to the defendant for and has received assurance that it will receive Federal financial assistance for the proposed construction of and otherwise in support of the Twelve Proposed Projects. The Authority proposes to use such assistance in the construction of and otherwise in support of the Five Proposed Projects and the Twelve Proposed Projects.

21. By reason of the facts hereinabove alleged the rights of plaintiffs and the class they represent under the due process clause of the Fifth Amendment to the Constitution of the United States have been and will continue to be violated, and plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under the due process clause of the Fifth Amendment to the Constitution of the United States, and that plaintiffs and the class they represent have the right under said Amendment to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which have been selected in a racially discriminatory manner or which will have

the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT II

1. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §§ 1331 and 1343(4). This is an action in equity seeking declaratory relief under Title 28, U.S.C. §§ 2201 and 2202 and an injunction. The right sought to be secured in this action are rights secured by an Act of Congress providing for equal rights and for the protection of civil rights, to-wit, Title 42, U.S.C. § 2000d (Section 601 of Title VI of the Civil Rights Act of 1964). The matter in controversy exceeds, exclusive of interest and costs, the value of $10,000.

2. This is a proceeding for a declaration that the defendant has assisted in the carrying on and continues to assist in the carrying on of a racially discriminatory public housing system within the City of Chicago, Illinois, in violation of Title 42, U.S.C. § 2000d, for a permanent injunction enjoining the defendant from continuing to assist in the carrying on of the racially discriminatory aspects of such public housing system in the future, and for other appropriate relief.

3-20. The allegations of paragraphs 3 through 20 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 20 of this Count II.

21. By reason of the facts hereinabove alleged the rights of plaintiffs and the class they represent, under Title 42, U.S.C. § 2000d, have been and will continue to be violated, and plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury. Plaintiffs and the class they represent have no adequate remedy at law to redress the grievances herein set forth.

WHEREFORE, Plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under Title 42, U.S.C. § 2000d, and that plaintiffs and the class they represent have the right under said Title 42, U.S.C. § 2000d to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which have been selected in a racially discriminatory manner or which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT III

1-15. The allegations of paragraphs 1 through 15 of Count I of this Complaint are incorporated herein by reference as paragraphs 1 through 15 of this Count III.

16. Since 1950 substantially all of the sites selected by the Authority for regular family public housing projects have been in Negro neighborhoods and within the areas known as the Negro Ghetto. After 1940 the Authority sold and did not build regular family public housing projects upon sites previously acquired by it in white neighborhoods.

17. Each of the sites for the Five Proposed Projects and for the Twelve Proposed Projects is in a Negro neighborhood, and within the areas known as the Negro Ghetto.

18-21. The allegations of paragraphs 18 through 21 of Count I of this Complaint are incorporated herein by reference as paragraphs 18 through 21 of Count III.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under the due process clause of the Fifth Amendment to the Constitution of the United States, and that plaintiffs and the class they represent have the right under said Amendment to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

COUNT IV

1-2. The allegations of paragraphs 1 and 2 of Count II of this Complaint are incorporated herein by reference as paragraphs 1 and 2 of this Count IV.

3-15. The allegations of paragraphs 3 through 15 of Count I of this Complaint are incorporated herein by reference as paragraphs 3 through 15 of this Count IV.

16-17. The allegations of paragraphs 16 and 17 of Count III of this Complaint are incorporated herein by reference as paragraphs 16 and 17 of this Count IV.

18-21. The allegations of paragraphs 18 through 21 of Count II of this Complaint are incorporated herein by reference as paragraphs 18 through 21 of this Count IV.

WHEREFORE, plaintiffs pray:

(1) That after a full hearing this Court declare that the Authority has been and is carrying on a racially discriminatory public housing system within the City of Chicago, Illinois, that such system is in violation of the rights of plaintiffs and the class they represent under Title 42, U.S.C. § 2000d, and that plaintiffs and the class they represent have the right under said Title 42, U.S.C. § 2000d to end the employment of Federal financial assistance in connection with and in support of the racially discriminatory aspects thereof;

(2) That after a full hearing this Court permanently enjoin the defendant from making available to the Authority any Federal financial assistance to be used in connection with or in support of the racially discriminatory aspects of the Authority's public housing system within the City of Chicago, or for the construction or otherwise in support of the Five Proposed Projects or the Twelve Proposed Projects on any sites which will have the effect of continuing and strengthening existing patterns of Negro residential and school segregation in the City of Chicago; and

(3) That plaintiffs and the class they represent be given such other and further relief as the Court may deem just and equitable.

ALEXANDER POLIKOFF
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Civil Action No. 66 C 1459

[Filed July 14, 1969]

DOROTHY GAUTREAUX, ODELL JONES, DOREATHA R. CRENCHAW, EVA RODGERS, JAMES RODGERS, ROBERT M. FAIRFAX and JIMMIE JONES, PLAINTIFFS

v.

THE CHICAGO HOUSING AUTHORITY, a corporation, and C. E. HUMPHREY, Executive Director, DEFENDANTS

SUGGESTION ON RECORD OF DEATH

May it please the Court:

Plaintiffs suggest to the Court that DOROTHY GAUTREAUX, one of the Plaintiffs, has died, and that the cause of action should proceed at the suit of the surviving Plaintiffs.

/s/ Alexander Polikoff
ALEXANDER POLIKOFF
One of the Attorneys
for Plaintiffs

DATED: July 14, 1969

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed January 15, 1970, in
Civil Action No. 66 C 1459]

[Title Omitted in Printing]

EXCERPT FROM DEPOSITION OF
JOSEPH BURSTEIN

March 25, 1968

APPEARANCES:

ALEXANDER POLIKOFF, for Plaintiffs,
WILLIAM J. HURLEY, for Defendant
Chicago Housing Authority,

ALSO PRESENT:

JACK SCHMETTERER, Assistant United States Attorney, for the Secretary of Housing and Urban Development

• • • •

[105] MR. SCHMETTERER: • • •

Which sites of the 1966 proposed sites did you determine upon to reject?

THE WITNESS: Those sites we had determined upon to reject were those that were subsequently withdrawn by the Chicago Housing Authority.

MR. SCHMETTERER: What factors, if any, distinquished those sites from those which were subsequently approved?

MR. HURLEY: Objection.

THE WITNESS: The fact that distinguished them in the case of those sites that I referred to earlier were a combination of high concentration of Negroes in those areas plus a high concentration of public housing. In the case of the other sites, it was simply a high concentration of Negroes in the area.

MR. SCHMETTERER: Which sites had a high concentration of Negroes?

THE WITNESS: I don't—

MR. SCHMETTERER: I don't mean by identity—the ones that were accepted or rejected.

THE WITNESS: The ones that were rejected.

MR. SCHMETTERER: I have no further questions.

MR. POLIKOFF: May I ask one or two questions to [106] clarify this last exchange?

BY MR. POLIKOFF:

Q Did you say the ones that you determined to reject involved two elements: number one, they had a high concentration of Negroes in the area; and, number two, a high concentration of public housing in the area? Whereas, the sites that were subsequently approved involved only one, but not both of those elements?

A No.

Q Oh, I'm sorry.

A We rejected a number of sites. Of the sites that we rejected, some of them had both elements—a high concentration of Negroes and a high concentration of public housing. Others simply had a high concentration of Negroes.

Q Others among those that were rejected?

A That's right.

Q Thank you.

Was the rejection based on any specific provision of the law or regulation?

MR. HURLEY: Objection. There has been no showing that there was any rejection by the HAA at this point. As Mr. Burstein testified, the sites were withdrawn by the Chicago Housing Authority. Now, whether they had objections to them on a particular basis, that's one thing. But there has been no showing here that there was a rejection, as such.

[107] BY MR. POLIKOFF:

Q I will rephrase the question. Was the position of HAA as you have described it in answering Mr. Schmetterer's questions, based on any specific provision of law or regulation?

A Yes, they were based generally on our regulations pursuant to site selection regulations.

Q You have reference in particular to the regulations that were placed into effect in early 1967?

A No. The earlier regulations, because the '67 regulations were not then in effect.

MR. HURLEY: May I state for the record that I object to the cross-examination as well as the direct examination by Mr. Schmetterer and it is a continuing objection. Just for the record.

BY MR. POLIKOFF:

Q One last question. Was your determination to your position with respect to the rejection of these sites communicated to the Chicago Housing Authority?

A No, I don't recall that they were. I stated earlier, if you will recall, when you asked me what course had we determined on, the course we had determined upon, as of that time, was to call on the Chicago Housing Authority and discuss with them. I was asked more recently had we determined to reject those sites. The answer was yes. But [108] what action we had determined upon to take, if our meeting with Chicago had not turned out the way it had, we had not yet made any determination as what course of action we would follow if the meeting did not turn out to be a satisfactory one.

MR. HURLEY: This is what my objection was. These questions have been asked and answered, and there is no doubt in Mr. Burstein's mind—he wasn't confused by the questions.

MR. SCHMETTERER: I think everybody here understands that there might have been an ambiguity on the record which I could not, as Counsel for the agency, allow to stand.

MR. HURLEY: Any ambiguity, I would respectfully submit, Mr. Schmetterer, is apparent only to you.

MR. SCHMETTERER: Anybody else have any question? Everybody finished with the witness?

The deposition will conclude.

(Whereupon, at 4:35 p.m. o'clock, the deposition was concluded.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

[Filed June 12, 1970]

[Title Omitted in Printing]

AFFIDAVIT OF DON MORROW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

CITY OF CHICAGO)
) ss.
COUNTY OF COOK)

Don Morrow, being first duly sworn, upon oath, deposes and says:

1. I am the Deputy Regional Administrator of Region IV, Department of Housing and Urban Development, a Department of the Executive Branch of the United States. In the absence of Francis D. Fisher, Regional Administrator, Region IV, Department of Housing and Urban Development, I serve as the Acting Regional Administrator.

2. As Regional Administrator, Francis D. Fisher has general supervision over the administration of the various programs of the Department of Housing and Urban Development in Region IV thereof which Region includes, among other states, the entire State of Illinois. His supervision of this function is by virtue of various Organizational Orders and Delegations of Authority from the Secretary of the Department of Housing and Urban Development.

3. The information set forth below has been compiled by the Regional Office staff of Region IV in accordance with and pursuant to my direction for the purposes of providing this Court with updated information with respect to (1) events relating to the Chicago Housing Authority since the entry of the Judgment Order in the case of Dorothy Gautreaux, Odell Jones, Doreatha R. Crenchaw, Eva Rodgers, James Rodgers,

Robert M. Fairfax and Jimmie Jones, Plaintiffs, v. The Chicago Housing Authority, a corporation, and C. E. Humphrey, Executive Director, Defendants, Civil Action No. 66 C 1459; and (2) other efforts on the part of the Department of Housing and Urban Development (HUD) to advance the purposes of desegregation and low income housing production.

Since the entry of the decree, the Department has focused on three objectives: Improving the living environment for residents of existing housing projects; the provision of low rent housing in the General Public Housing areas of Chicago; and increasing the supply of housing for low and moderate income families in the Chicago suburban areas.

The first objective has been substantially aided by a grant from the Department to the Chicago Housing Authority of $20,006,000 for improvements to existing low rent housing developments. The tenants have established the priorities for the use of the funds. They have chosen to spend the money primarily on day care and community facilities, improvement of apartment interiors, and changes in the exteriors of the buildings to improve their appearance and to increase the safety of the tenants. The Housing Authority will likely receive from HUD at least another two million dollars before July 31, 1970, out of supplemental monies for project modernization.

The Department has taken three steps toward the second objective. We informed the Chicago Housing Authority that our office would undertake an expeditious review of possible sites for low rent housing in the General Public Housing area as soon as CHA could provide our office with the addresses. Through two submissions on December 17 and 29, CHA provided HUD with sites which at a maximum would provide for 2,016 units of low rent housing in the General Public Housing area. Through letters of March 3 and 13 we informed CHA that we could

give tentative approval to 189 of those sites which would support 1,302 units of housing. On May 4 the Authority submitted an additional 61 sites in the General Public Housing area which would provide for 239 units. By letter of May 28, we notified CHA that tentative approval was given to 50 of these sites which would provide for 198 units. Thus at the present time we have given tentative approval to 239 sites in the General Public Housing area of the City of Chicago which would support approximately 1500 units. Assuming that the City Council approved all of these sites, the Authority would have more land than needed to build the 1500 units of family housing for which they have a reservation of funds.

The second step this office has taken was to inform CHA that HUD would approve significant increases in the average per unit land cost. The average was to be based on the total development program for family units—presumably 1500 units. This increase for land cost was authorized to help eliminate the land cost barriers to building in the General Public Housing area.

The Department has also consistently told CHA that funds for the 1500 units were being reserved so that there would be no delay in the beginning of construction once City Council approval was obtained, although national pressure for funds makes timely action necessary.

Pursuit of the third objective of building in the suburbs has called for a multiplicity of actions. One level of our activity has been to help identify sites for low rent housing. The Department contracted with the Real Estate Research Corporation to develop site criteria for low and moderate income housing. That study is now complete.

The development of the criteria was done in cooperation with the CHA and the Cook County Housing Authority. The actual work of site selection in the

City of Chicago undertaken to date by the Chicago Housing Authority and outlined above will be chargeable to HUD as a development cost of the housing which will result.

The Northeastern Illinois Planning Commission has agreed to undertake an identification of the locations within the Chicago metropolitan area where low and moderate income housing should be built. They will be using the criteria developed through the above-mentioned study in conjunction with their general planning criteria for the region. Added to these criteria will be the special attention urged by HUD to achieving the objective of a racial and economic balance in communities within the region. The Planning Commission will then do studies of the land within the general locations they have identified as appropriate for low and moderate income housing. The specific analysis of land will include its availability, cost, soil conditions, water table and zoning. This information will then be provided to the Illinois Housing Development Authority, Cook County Housing Authority and the State Office of Housing and Buildings which will perform a liaison function with local housing authorities. The Planning Commission staff has also agreed to work to eliminate zoning restrictions which might stand in the way of housing on the land which they indicate is appropriate for low and moderate income housing. The purpose of this effort is to obtain a high involvement in location decisions for low and moderate income housing by the Regional Planning Commission. Physical and social aspects of housing should be as carefully planned for as the placement of open space and sewer systems.

This information will begin being provided by the Commission in a few months. In the meantime to satisfy an immediate need for housing sites in Cook County, we have indicated to the Cook County Housing Authority that HUD will look favorably on a request for an advance loan to the Authority to

identify sites in Cook County suitable for low rent housing. We expect to receive this request in the very near future.

Another level on which we have pursued the third objective is in our dealings with individual communities. We are urging Chicago area communities receiving HUD assistance to provide some low and moderate income housing in their communities. As is evident, the successful exercise of such encouragement and the administration of other forms of HUD assistance requires a substantial degree of flexibility and adroitness by our staff.

/s/ Don Morrow
DON MORROW
Deputy Regional Administrator,
Region IV
Department of Housing and
Urban Development

City of Chicago)
) ss.
County of Cook)

Subscribed and sworn to before me this 8th day of June 1970

/s/ Norman S. Joseph
Notary Public

My Commission expires
Jan. 13, 1971

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed November 26, 1971]

[Title Omitted in Printing]

Name of Presiding Judge, Honorable

RICHARD B. AUSTIN

Reserve space below for notations by minute clerk

Enter order consolidating Case numbered 66 C 1459 and 66 C 1460 (DRAFT)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed December 23, 1971]

[Title Omitted in Printing]

ORDER

This matter coming on to be heard pursuant to plaintiffs' motion for further relief, and the Court having considered the opinion of the Court of Appeals for the Seventh Circuit of September 10, 1971 in this cause and the mandate issued pursuant thereto, and this Court's order herein of November 11, 1971, and the Court having heard the presentations of the parties and being fully advised,

It is hereby ordered:

1. The parties shall attempt to formulate a comprehensive plan to remedy the past effects of unconstitutional site selection procedures in the public housing system in the City of Chicago and present the same to the Court within sixty days from the date hereof;

2. If the parties cannot agree, each party shall file with the Court a proposed judgment order embodying a comprehensive plan to remedy the past effects of such unconstitutional site selection procedures within ninety days from the date hereof; and

3. In the preparation of such plan or plans, the parties are requested to provide the Court with as broad a range of alternatives as seem to the parties feasible as a partial or complete remedy for such past effects, including, if the parties deem it necessary or appropriate to provide full relief, alternatives which are not confined in their scope to the geographic boundary of the City of Chicago.

ENTER:

/s/ Richard B. Austin
Judge

12/23/71

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed February 2, 1972]

[Title Omitted in Printing]

MOTION TO ADD PARTIES DEFENDANT AND TO FILE SUPPLEMENTAL COMPLAINT

NOW COME plaintiffs, by their attorneys, and move this Court,

(1) For the entry of an order pursuant to Rules 19, 20 and 21 of the Federal Rules of Civil Procedure to add as parties defendant in this cause the Mayor of the City of Chicago, Richard J. Daley; the several duly elected and acting members of the City Council of the City of Chicago, Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William Cousins Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszcuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda, Jack I. Sperling; and the City of Chicago, a municipal corporation; and directing service of process upon them; and

(2) For the entry of an order pursuant to Rule 15(d) of the Federal Rules of Civil Procedure permitting plaintiffs to file instanter and to serve upon defendants a supplemental complaint setting forth certain events that have occurred since the filing of the original complaints herein.

In support of this motion, plaintiffs state as follows:

1. Rule 21 of the Federal Rules of Civil Procedure provides in relevant part that parties may be added by order of the court on motion of any party at any stage of the action and on such terms as are just.

2. Rule 19(a) of the Federal Rules of Civil Procedure provides in relevant part that a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party to the action if in his absence complete relief cannot be accorded among those already parties, or if, under certain circumstances, he claims an interest relating to the subject of the action.

3. Rule 20(a) of the Federal Rules of Civil Procedure provides in relevant part that persons may be joined in one action as defendants if there is asserted against them a right to relief in respect of a series of occurrences and if any question of law or fact common to all defendants will arise.

4. Rule 15(d) of the Federal Rules of Civil Procedure provides in relevant part that upon motion of a party the court may permit him to serve a supplemental pleading setting forth events that have happened since the date of the pleading sought to be supplemented.

5. The parties sought to be added as defendants by this motion are subject to service of process and their joinder will not deprive the court of jurisdiction over the subject matter of this action.

6. Attached hereto and made a part hereof is a copy of the supplemental complaint proposed to be filed if this motion is granted. Such supplemental complaint sets forth events that have happened since the date of the original complaints in this cause. It is probable that the parties sought to be added as defendants will oppose the relief sought in the supplemental complaint and that they will claim an interest relating to the subject of the action under Federal Rule 19(a)(2). The supplemental complaint asserts against the defendants a right to relief arising out of the same series of occurrences and presents questions of law and fact common to all defendants.

Accordingly, "it is probable that the relief sought [in the supplemental complaint] cannot be achieved, or can be achieved only partially or conditionally, without [the parties to be joined]." *Bradley* v. *School Board of City of Richmond, Virginia*, 51 F.R.D. 139, 141 (E.D. Va. 1970).

WHEREFORE, plaintiffs ask that their motions be granted and that an order be entered in substantially the form attached hereto.

Respectfully submitted,

ALEXANDER POLIKOFF
MILTON I. SHADUR
ROGER PASCAL
CECIL C. BUTLER
BERNARD WEISBERG
CHARLES R. MARKELS
MERRILL A. FREED
Attorneys for Plaintiffs

By: /s/ Alexander Polikoff
ALEXANDER POLIKOFF

February 1, 1972

Alexander Polikoff
109 N. Dearborn Street
Chicago, Illinois 60602
641-5570

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed February 2, 1972]

No. 66 C 1459

No. 66 C 1460

(Consolidated)

DOROTHY GAUTREAUX, et al., PLAINTIFFS

v.

CHICAGO HOUSING AUTHORITY, a corporation, CLEMENT E. HUMPHREY, Executive Director, Chicago Housing Authority, GEORGE W. ROMNEY, Secretary, Department of Housing and Urban Development, RICHARD J. DALEY, Mayor, City of Chicago, FRED B. ROTI, TYRONE T. KENNER, CLAUDE W. B. HOLMAN, LEON M. DESPRES, EUGENE SAWYER, WILLIAM COUSINS JR., ALEXANDER A. ADDUCI, EDWARD R. VRDOLYAK, MICHAEL A. BILANDIC, DONALD T. SWINARSKI, CASIMIR J. STASZCUK, EDWARD M. BURKE, FRANCIS X. LAWLOR, ANNA R. LANGFORD, WILLIAM H. SHANNON, EDWARD J. HINES, THOMAS F. FITZPATRICK, CLIFFORD P. KELLEY, BENNETT M. STEWART, FRANK D. STEMBERK, JOSEPH POTEMPA, DAVID RHODES, VITO MARZULLO, STANLEY M. ZYDLO, EUGENE RAY, JIMMY L. WASHINGTON, ROBERT BIGGS, ELMER R. FILIPPINI, THOMAS E. KEANE, TERRY M. GABINSKI, REX SANDE, WILSON FROST, CASIMIR C. LASKOWSKI, JOHN F. AIELLO, THOMAS J. CASEY, WILLIAM J. CULLERTON, ANTHONY C. LAURINO, SEYMOUR SIMON, EDWARD T. SCHOLL, BURTON F. NATARUS, WILLIAM S. SINGER, DICK SIMPSON, EDWIN P. FIFIELSKI, CHRISTOPHER B. COHEN, JOHN J. HOELLEN, MARILOU HEDLUND, PAUL T. WIGODA, JACK I. SPERLING, members of the City Council of the City of Chicago, and the CITY OF CHICAGO, a municipal corporation, DEFENDANTS

SUPPLEMENTAL COMPLAINT

NOW COME plaintiffs, by their attorneys, and for their supplemental complaint against defendants state as follows:

1. Defendant Richard J. Daley resides within and is Mayor of the City of Chicago. Under Section 3-11-14, Chapter 24, Illinois Revised Statutes, the Mayor of the City of Chicago presides at meetings of the City Council of the City of Chicago ("City Council") and has the power to vote at such meetings under certain circumstances.

2. Defendants Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William Cousins Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszcuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda, and Jack I. Sperling are all of the duly elected and acting members of the City Council and reside in the City of Chicago.

3. Defendant City of Chicago ("City") is an Illinois municipal corporation having a population of more than 500,000 persons. The City Council is the governing body of the City.

4. On February 10, 1969, this Court issued its memorandum opinion in this cause. 296 F.Supp. 907.

5. On July 1, 1969, this Court entered its judgment order ("Judgment Order") in this cause. 304 F.Supp. 736.

6. On September 10, 1971, the Court of Appeals for the Seventh Circuit issued its opinion in this cause.

448 F.2d 731. Pursuant thereto this Court entered its order of December 23, 1971.

7. The Judgment Order provides, among other things, that the defendant Chicago Housing Authority ("CHA") shall

> "use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end . . ." (304 F. Supp. at 741.)

8. CHA's efforts to increase the supply of Dwelling Units as provided in the Judgment Order require CHA to acquire real property.

9. Section 9 of Chapter 67½, Illinois Revised Statutes, provides in part that no real property shall be acquired in a municipality having a population in excess of 500,000 by the housing authority within whose area of operation such municipality is located until the housing authority has advised the governing body of the municipality of the description of the real property proposed to be acquired and the governing body of the municipality has approved the acquisition thereof by the housing authority. Such provisions of said Section 9 are deemed by CHA to apply to its acquisitions of real property.

10. From July 1, 1969 until March 5, 1971, CHA did not advise the City Council of any real property proposed to be acquired by it for the purpose of increasing the supply of Dwelling Units in conformity with the Judgment Order.

11. On March 1, 1971, this Court entered an order directing CHA to advise the City Council on or before March 5, 1971, of real property proposed to be acquired by it for the purpose of providing not fewer than 1500 Dwelling Units in conformity with the Judgment Order. On March 5, 1971 CHA complied with such order and did so advise the City Council.

12. On January 3, 1972 this Court entered an order directing CHA to file certain plans with the Court on or before January 18, February 2 and Febrary 17, 1972, respectively. In its "Response" to paragraph 1

of such order, filed by CHA on January 18, 1972, CHA advised the Court as follows:

(a) In June, 1971, the City Council approved the acquisition by CHA of real property said by CHA to be suitable for the provision of 302 Dwelling Units in conformity with the Judgment Order; and

(b) Subject to the approval of the Department of Housing and Urban Development ("HUD") CHA proposes to acquire real property, the acquisition of which was so approved by the City Council in June, 1971, at 29 different locations, said to be suitable for the provision of 199 Dwelling Units in conformity with the Judgment Order.

13. Since June, 1971, the City Council has not approved the acquisition by CHA of any real property for the purpose of providing Dwelling Units in conformity with the Judgment Order.

14. Relying upon such lack of such approval and upon the provisions of Section 9, Chapter 67½, Illinois Revised Statutes, CHA has not acquired real property for the provision of Dwelling Units in conformity with the Judgment Order. Such failure by CHA to acquire real property for such purpose has the effect of denying to the plaintiffs the relief to which they are entitled under the Judgment Order and of preventing this Court from providing a full remedy for the violations of federal constitutional rights which this Court's memorandum opinion of February 10, 1969, found to have occurred.

15. Paragraph 2 of this Court's order of January 3, 1972, requires CHA to file with the Court on or before February 2, 1972, a specific plan for the prompt acquisition by CHA, regardless of any action taken or not taken by the City Council, of such number of additional sites for Dwelling Units as will, when added to the sites approved by the City Council in June, 1971, permit CHA to provide the 1500 Dwelling Units referred to in this Court's order of March 1, 1971. Such order of January 3, 1972, further provides that a hearing for the consideration of such plan and the entry

of further orders in connection therewith shall be held on February 17, 1972.

WHEREFORE, following such hearing on February 17, 1972, plaintiffs pray:

(a) for the entry of a declaratory judgment that under the circumstances set forth herein the effect of the operation of Section 9, Chapter 67½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from providing a full remedy for the violations of federal constitutional rights which the Court's memorandum opinion of February 10, 1969, found to have occurred;

(b) for the entry of an order directing CHA to acquire, regardless of any action taken or not taken by the City Council, such additional sites for Dwelling Units as are specified in CHA's plan therefor to be filed on February 2, 1972, subject to such modifications therein as may be appropriate in light of the evidence adduced at such hearing of February 17, 1972;

(c) for the entry of an order directing CHA to provide Dwelling Units on such additional sites as rapidly as possible; and

(d) for the entry of an order granting plaintiffs such other and further relief as the Court may deem just and equitable.

Alexander Polikoff
Milton I. Shadur
Roger Pascal
Cecil C. Butler
Bernard Weisberg
Charles R. Markels
Merrill A. Freed
Attorneys for Plaintiffs

By: /s/ Alexander Polikoff
Alexander Polikoff

February 1, 1972
Alexander Polikoff
109 N. Dearborn Street
Chicago, Illinois 60602
641-5570

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed February 2, 1972]

[Title Omitted in Printing]

ORDER

This matter coming on to be heard on the motion of plaintiffs to add parties defendant and to file a supplemental complaint, and the Court having heard the presentations of the parties and being fully advised,

IT IS HEREBY ORDERED:

1. The Mayor of the City of Chicago, Richard J. Daley, the several duly elected and acting members of the City Council of the City of Chicago, Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William Cousins, Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszcuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda and Jack I. Sperling, and the City of Chicago, a municipal corporation, be and they hereby are made parties defendant in this consolidated cause;

2. Leave is hereby granted to plaintiffs to file instanter the supplemental complaint referred to in said motion of plaintiffs;

3. Defendants Chicago Housing Authority and George W. Romney shall answer or otherwise plead to the supplemental complaint on or before February 16, 1972, and the newly added defendants shall answer or otherwise plead to the supplemental complaint within the time provided in Rule 12(a) of the Federal Rules of Civil Procedure; and

4. Plaintiffs shall cause copies of the supplemental complaint and this order to be served as promptly as possible upon the newly added defendants in the manner provided in Rule 4 of the Federal Rules of Civil Procedure, and Henry McMorris is hereby appointed pursuant to Rule 4(a) of the Federal Rules of Civil Procedure as a person empowered to make such service.

ENTER:

/s/ R. B. Austin
Judge

February 2, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FROM TRANSCRIPT OF
FEBRUARY 22, 1972

PRESENT:

MR. ALEXANDER POLIKOFF,

MR. MILTON I. SHADUR,
on behalf of Plaintiffs;

MR. J. C. MURRAY and

MR. WILLIAM WARNOCK,
on behalf of the Government;

MR. PATRICK W. O'BRIEN,

MISS KATHRYN KULA,
on behalf of Chicago Housing Authority;

MR. EARL L. NEAL,
on behalf of City of Chicago.

* * * *

[2] MR. POLIKOFF: Would you like me to start, Jim?

MR. MURRAY: Yes, please. I would appreciate it. That will give Mr. Warnock more time to get over here.

MR. POLIKOFF: All right.

Your Honor, we are here this morning because on December 23rd you entered this order.

THE COURT: I have got a copy of it right here.

MR. POLIKOFF: Which says that the parties should attempt to formulate a comprehensive plan to remedy the past defects of unconstitutional site selection procedures and present the same to the Court within 60 days.

Then it goes on to say, as you know, if the parties can't agree they should each file their own proposed judgment order in 90 days.

Well, this is the 60-day period and we thought it appropriate to report where we are at the end of the 60 days provided in your order and that is why we are here.

I agreed with Mr. Murray that HUD's report would go first, but I guess under the circumstances ours should.

Is that agreeable?

[3] MR. MURRAY: That is correct, yes.

Mr. Warnock, the Regional Counsel of the Department of Housing and Urban Development, will be making the report for that agency.

MR. POLIKOFF: So what I am now, in about two minutes, going to tell your Honor is where the plaintiffs are at the end of the 60-day period.

We have, during this 60-day period, tried, with HUD, with CHA and with the City to get a dialogue going on the preparation of a comprehensive plan which would be responsive to your Honor's December 23rd order. So far, at least, the CHA and the City have each declined to meet with us for that purpose.

We have, however, met with the General Counsel of HUD, Mr. Maxwell. Mr. Shadur and I met with him in Washington several weeks ago. On the basis of that meeting and subsequent correspondence, my understanding is that the plaintiffs and HUD are prepared this morning to jointly represent to your Honor the following two propositions:

First, the parties are of the view, that is HUD and the plaintiffs, as I have indicated we are not speaking for the City and CHA here—

THE COURT: Get another chair, Mr. Murray.

[4] MR. POLIKOFF: Good morning, Mr. Warnock.

MR. WARNOCK: Good morning.

MR. POLIKOFF: Shall I finish?

MR. MURRAY: I think you ought to repeat the first thing since it is the substance of the report and Mr. Warnock will be able to pick it up.

MR. POLIKOFF: I was just saying, Bill, that based on our meeting with Mr. Maxwell in Washington and

subsequent correspondence, my understanding is that HUD and the plaintiffs are prepared jointly to represent two propositions to Judge Austin this morning. The first is that in principle the parties are of the view that a metropolitan remedy is desirable, that is remedy for the past defects of the unconstitutional site selection procedures; and, secondly, that in principle HUD would be willing to participate in the development of a metropolitan remedy which would be responsive to the Court's December 23rd order if the state and the local levels took the lead in the development of a metropolitan plan.

For the plaintiffs, your Honor, I want to say that we had hoped and sought more than that representation from HUD. We wanted HUD to play the leading role in the development of that plan. HUD has declined [5] to do so, so far at least, and therefore, speaking now only for the plaintiffs, we report that while we have agreement in principle on the two matters I just stated to your Honor—

THE COURT: Who has got the lead?

MR. POLIKOFF: —we do not have an ongoing, planning relationship with any of the other parties to the litigation at this point.

Under those circumstances the plaintiffs have no alternative but to go forward with the preparation of their own plan, responsive to the order. That we are doing. We probably will not be ready with a plan at the end of the 90-day period. We will ask for more time, I believe, at that time. I am not asking for that today because in 30 more days we will know more clearly how much time is needed.

I finally wish to say that, as we did in the CHA case, we will probably begin our submission to you and to the parties, of course, with an outline or suggestions of the principles that ought to be included in a final decree that everybody can then react to rather than submitting a complete proposed final decree at that time.

That concludes the plaintiffs' report.

[6] THE COURT: Now we have been waiting for a report from Washington.

MR. WARNOCK: Well, I think Alex has pretty well summarized the position that the Department has taken.

I must say I wasn't in Washington the day that he met with the General Counsel, but from what I have been told, his description of that meeting and what HUD agreed to do is correct.

As far as the order that Judge Austin entered back on December 23rd, I gather from your comments, Alex, and I understand from what took place in Washington, you conceded that there are significant reasons and obstacles to stand in the way of the Department from playing the leading role as the developer of comprehensive plans to remedy the past effects of the unconstitutional site selection procedures. It is basically a question of what is the responsibility of the Federal Government to state and local governments. What is the role which Congress has described or prescribed for the Department in initiating assistance to communities?

And it is for those reasons that the Department is not able to comply literally with the order [7] that the Judge entered back in December.

In terms of what we are willing to do and what we can do, quite correctly, we endorse the concept of metropolitan approaches to the housing problems, not just for Chicago but for all urban centers, because the problems of Chicago are not unlike those of most of the other large metropolitan cities. And the Secretary has said repeatedly, before Congress and in public engagements, that there is a need for local communities to stand together and face up to the problems that relate not only to the—

THE COURT: How do you propose to bring that about?

MR. WARNOCK: Well, I think that the most logical approach, the one that is most likely to succeed, is where local communities will initiate this kind of action, and not through—

THE COURT: In the event of no initiation, where do you go?

MR. WARNOCK: Well, Judge, I think that it is a question of continuing to mold and shape public opinion. And the Secretary is hard at work at that goal.

It is also a question of what incentives [8] the Federal Government can add into the mix.

As you may know, the Secretary has stated that he is going to attempt to secure the cooperation of metropolitan government officials in a number of cities around the country, and the incentive would be greater planning assistance, money being provided by the Federal Government to achieve metropolitan approaches to the housing problem.

I think that is the way—there is a way to succeed in developing scatteration of low and moderate income housing.

I don't believe that you are going to achieve any degree of success by trying to hammer it out in the courtroom and ordering parties to do things. I think that in terms of where the initiatives lie, they have to lie with the local communities, and I think there is a growing recognition on the part of local officials that they have to take account of not only their own little community, but what is happening in the large urban center upon which they are so vitally dependent.

THE COURT: I mean, you really believe that?

MR. WARNOCK: I really believe that, Judge.

• • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FROM TRANSCRIPT OF
July 24, 1972

APPEARANCES:

ALEXANDER POLIKOFF, for Plaintiffs

PATRICK W. O'BRIEN, for Defendant Chicago Housing Authority

JAMES C. MURRAY, Assistant United States Attorney, for Defendant Secretary of Housing and Urban Development

* * * *

[62] MR POLIKOFF: * * * The first one by your Honor when you asked a question, I believe, of Alderman Simpson or maybe Mr. O'Brien or Mr. Murray, I am not sure which. You said, "Has it been proven that there was any segregation of housing out there outside of Chicago?" And the implication of that question, if I read it correctly—

THE COURT: I mean, other than what you consider segregation under the current zoning laws.

MR. POLIKOFF: I want to point out that we have not in this lawsuit attacked current zoning laws. Our relief has nothing to do with zoning laws, not at this stage at least.

We are addressing ourselves to the wrong that was committed by segregating public housing within the City of Chicago as it was—

THE COURT: By the Chicago Housing Authority and by HUD.

MR. POLIKOFF: —by the Chicago Housing Authority and HUD.

THE COURT: All right, let's keep it on this level.

MR. POLIKOFF: You asked, "Has there been any wrong proven out there, Arlington Heights, Palatine,

Evanston, Flossmoor, Highland Park—any of those parties committed any wrong?" The implication of that [63] question was that unless the plaintiffs can show some wrong of that sort, that public housing sort we are talking about or indeed any other sort was committed by those parties, that the relief we are talking about is lacking a base. There is no underlying wrong that would authorize your Honor to grant relief with respect to those parties. That's the first point I want to address myself to.

THE COURT: All right, go ahead.

MR. POLIKOFF: The succinct answer—and I will try to make this very narrow and precise—is that we do not propose asking your Honor to enter any order against Flossmoor or any order against Highland Park or Evanston or even any order against the Cook County Housing Authority or the DuPage Housing Authority or any of the other communities or housing authorities in the Chicago urbanized area.

THE COURT: Since you again dropped that name, I am again going to say to you and to the press, "I don't live in a lily-white suburb. We have blacks out there. They are lovely neighbors. They go to my church. They go to my grandchildren's schools. They visit each other at their homes and at the other homes and this sotto voice Flossmoor business, you can do what you [64] want with it but I am again going to reiterate that I don't and haven't for some time lived in a lily-white suburb and I don't want to live in one and I don't intend to live in one and I don't live in one."

So let's go on with anything else you want to say sotto voice and I'll refer to that, too.

MR. POLIKOFF: Well, let me tell your Honor that I mentioned in the same sotto voice, if that's the phrase for it, the community in which I live, and mine is not lily-white either and I used those examples as well as others to make it crystal clear, perfectly clear that with respect to any of the communities that we are talking about here, whatever their record in the past, favorable or unfavorable, good, bad, or indifferent with respect to race relations, it's irrelevant. We are not seeking

an order against any of those communities. We are not seeking to prove that any of those communities have committed a wrong. And I read into your Honor's question about whether there has been segregated public housing in any of those communities since or feeling that unless we make such a showing we aren't entitled to the kind of order we're talking about.

I want to respond to that implied question, [65] and the first part of the response is to point out that we aren't seeking an order directing those communities to do anything.

Your Honor knows, I believe, as the document, before you so state that under the state law CHA can go anywhere in the State of Illinois. It is not confined to the City of Chicago by state law. The only requirement before it can go any place else in the State of Illinois and the City of Chicago is that it have the consent of the local housing authority to do so. The precise analogy to the situation with respect to where CHA can go physically, territorially, that I wish to call your Honor's attention to is the analogy with respect to where it can go in the City of Chicago. It can't go anywhere in the City of Chicago without somebody's consent; namely, the City Council's.

THE COURT: Well, that's the way it used to be.

MR. POLIKOFF: Precisely. And why was it changed? It was changed because your Honor found that the inability of CHA to go wherever it wanted to go in the City of Chicago was frustrating the carrying out of necessary relief in this case, so to here.

THE COURT: By virtue of the conduct of the City Council.

[66] MR. POLIKOFF: Right. And what was that conduct? Simply inaction. Simply a refusal on the part of City Council to consider and act upon a proposal to permit CHA to go where it wanted.

Now that is all we are talking about.

THE COURT: That isn't the way it started out.

MR. POLIKOFF: That's the way it ended and that's the evidence on the basis of which the order was entered.

We did not prove and we didn't try to prove that the City Council was itself racist or segregationist. Your Honor may have believed this but we have been very careful throughout the introduction of evidence in this case not to make this a case in which we are charging any alderman of the City of Chicago or the Mayor of the City of Chicago with racism. And the cases we cited to your Honor and the evidence we introduced to your Honor was limited to one point and one point only, and I believe the order that your Honor entered on April 10th, 1972, reflects that, and that one point was that the refusal of the City Council to act to permit CHA to go where it wanted to go is frustrating the carrying out of the Court's order, and therefore, it's setting aside that requirement.

[67] Now, let me take Evanston—we will pick a neutral turf here. If your Honor, after an evidentiary hearing, should find that the refusal of the Cook County Housing Authority to permit the CHA to build some public housing in Evanston was frustrating the relief that the Court felt was necessary, by precise analogy with the order you entered against the City Council, you could enter an order setting aside the state law that prevents CHA from going where it wants and needs to go to carry out your Honor's orders.

The Cook County Housing Authority wouldn't be directed to do anything.

The City Council wasn't directed by your Honor in its April 10th order to do anything. You simply set aside in that order a requirement of state law that freed CHA to go forward, and that is the principle that we are talking about here.

To carry out that principle and apply that principle, your Honor, it is not necessary to find that the wrong has been committed by the Cook County Housing Authority or the City of Evanston, just as you did not find and we didn't ask you to find, there was no evidence to find that a wrong was committed by the City Council.

[68] The only thing you found that it's necessary for CHA to be free to go where it wants in the City of

Chicago, and you set aside the road blocks to that, the obstacles to that.

That's the first point I wanted to make in response, but let me emphasize it in a summary sentence.

The state law gives CHA the power to go anywhere in Illinois with somebody's consent. The state law gives CHA power to go anywhere in Chicago with somebody's consent.

When you found that the refusal to give that consent was barring CHA from doing what it ought to do, you set that state law aside.

Similarly the principle we are talking about is identical with respect to setting aside the state law that permits CHA to go into Cook County or DuPage County, and you do not in either case have to prove that a wrong was committed by the City Council or by the Cook County Housing Authority. All we would propose to do in that respect is in a normal evidentiary hearing show your Honor evidentiarily if we can't prove it in a matter of evidence, we lose, but try to show your Honor that it's necessary to give full relief to have some units provided in Cook County as well as [69] in Chicago. That's the fulcrum.

O.K. Second point I want to make in response:

You said, again, to one of the parties who was speaking to you that the segregation complained of was within the City of Chicago and the implication I believe was that, therefore, the relief must be confined to the City of Chicago.

I want to remind your Honor when I came in here the first day and said, "We've got to deal with the City Council now with its veto power," what you said to me and I happen to remember this, it won't be a quotation, but it will be a pretty good paraphrase. You said, "Do you think I have in mind, Mr. Polikoff, when I entered my order back in 1969, July 1 of 1969, do you think I had in mind setting aside this veto power of the City Council?" And the inference from what you said was that you obviously did not have it in mind. And I'm sure that's right. I didn't have it in mind. I don't think anybody had it in mind.

THE COURT: I didn't know it was going to become necessary to do so.

MR. POLIKOFF: Exactly, and I didn't know it either back in 1969, and neither did I know back in 1969 that it was going to be necessary—

[70] THE COURT: I mean, you were an optimist there. You were naive at that time. You assumed that the City Council would perform its governmental function. I chuckled at you when you said that and predicted that this was the end of public housing in the Chicago area.

MR. POLIKOFF: Well, whether I am naive or optimistic or some third thing, you can choose any adjective you want, the fact is that you didn't have it in mind as I didn't back in 1969 that we'd have to set aside or ask you to set aside this law with respect to somebody who is a non-party, that Mr. Murray emphasized that we are talking about, a non-party, someone who has never been in the case, against whom we have never introduced or made any allegations—or introduced any proof and yet we came in and we persuaded you on the basis of law and evidence that as the facts have developed in the case since the first order it was now necessary to deal with a non-party and to deal with it in the way I talked about, not by proving that it was committing wrong, but by proving that non-action by that party was standing in the way. We got the party brought in and a declaratory judgment was entered.

It's exactly that same principle that we are [71] talking about here.

Again, if we can prove to your Honor after an evidentiary hearing that the 8500 units that we are talking about with respect to CHA are not enough that some additional amount is needed, and that some portion of that additional amount should on basic principles of equity go outside the City of Chicago, then it doesn't matter that the segregation complained of originally was carried out exclusively within the City of Chicago if the Court determines that it's necessary to go outside the city of Chicago for relief.

Again I will summarize that second point. I have only one more point to make. I'll summarize that second point.

It is true that the segregation complained of was physically limited to within the City of Chicago. It is not true that the Court is limited so far as giving relief from that wrong is concerned to those same territorial limits if after an evidentiary hearing it determines that going more broadly is necessary.

The problem of parties is no problem at all, as witnesses what happened when we brought in the City Council, a theretofore non-party.

[72] Mr. Murray parenthetically said that the state law we are talking about, that was talked about in the Louisiana case existed prior to the commencement of that litigation.

MR. MURRAY: No, no, subsequent to.

MR. POLIKOFF: I am sorry. Yes.

It was passed subsequent to the litigation. I think that that may very well be true in the Louisiana case and I think that is right. That has nothing to do with the principle.

In the April 10th order when we set aside the City Council's veto power, the state law was set aside and that case was passed long prior to the commencement of this litigation and all the authorities that are cited in that order, the laws, most of them at least, were passed prior to the commencement of litigation and that is simply an irrelevant red herring.

The final point that I wish to make, your Honor, relates to something that Mr. O'Brien said, then I'll briefly summarize where I think we are in just one or two sentences.

Mr. O'Brien talked about the grandiose plans, and he previously called it a wish list of 60,000 units and so on. [73] I am not naive enough to assume and I'm sure that your Honor doesn't assume that I assume that the 60,000 units we are talking about is anything other than a measure of the needed amount of relief over whatever period of time it takes, depending on how much money Congress allocates—I am sorry, appropriates, and how much HUD allocates to this area. Nobody is talking about trying to force Congress to do anything or HUD to give more money to Chicago than they give to San Francisco or Los Angeles or Detroit.

We are only talking about seeing to it that whatever amounts of money are allocated to the area for housing by the responsible federal parties, Congress and then HUD, are then used after such allocations in a way that is the reasonably related to the supplying of relief in this case.

What we are trying to do, your Honor, is to see to it that the money that is being poured right now, currently, and next year and next year by HUD into the Chicago area is used in a way to provide relief to the plaintiff class and not in other ways.

Let me summarize. I think what the plaintiffs seek is to persuade your Honor, an opportunity to do so in a normal way, now that you have heard everybody's [74] reactions, with witnesses and law, that more than the 8500 units is necessary to provide relief. That's going to be duck soup in terms of evidence. I think that's hardly disputed—that those additional units beyond the 8500, some percentage of them should go outside the City of Chicago and that the Court has the power as a matter of law having made the factual determination that more than 8500 is necessary, No. 1, and some portion of the excess should go outside the City of Chicago, No. 2, that the Court has the power in the format we've suggested with relation to the analogy of the April 10th order where similarly in legal principle the same course was pursued, that the Court has the power to effect that kind of a remedy.

We think that the need for the effectuation of the principles of justice to which Alderman Simpson referred require that the Court not wash its hands of a difficult task, require that the Federal judiciary not knuckle under to a recalcitrant local housing authority and a recalcitrant City Council, but that the appropriate steps be taken to vindicate the Federal Constitution which is after all what's at stake in this case, your Honor.

My colleague, Mr. Shadur, may want to say [75] something, your Honor.

THE COURT: All right.

* * * *

[82] * * * THE COURT: What's next?

This is the end of our discussion. I am assuring you of that.

Is it a matter of setting this matter for—

MR. POLIKOFF: Your Honor, what the plaintiffs would ask is that unless anybody wants to further—have further discussion, which I don't ask for on our behalf at this point, that a date bet set in the fall in September or October as your Honor chooses, to give the opportunity—the plaintiffs the opportunity they have not yet had to introduce evidence before your Honor in support of a specific proposed judgment order.

MR. MURRAY: Your Honor, we would object to that proposal.

As your Honor indicated in your order of September 23rd contemplating the submission of a proposed judgment order by plaintiffs, that has not been done.

This conference, as I understood it, and as Mr. Polikoff's intermittent letters to the Court indicated, was sort of an outline to determine whether we were going to commence upon this approach legally [83] and that's the reason why.

I think we should have a determination at this point in time, because if your Honor does determine it then certainly we are going to have to take rather extensive discovery in order to prepare for such a hearing. I submit to your Honor now is the time we would urge the Court to rule upon it. I will make a formal motion to that effect, move to enter our proposed judgment order.

MR. O'BRIEN: Your Honor, on behalf of CHA I see no point in proceeding to a hearing, any kind of a hearing on the form of proposed order until there is before us all a form of proposed order on behalf of the plaintiffs which at this time there is not. There is a very sketchy outline. Your Honor, I would not

be prepared for a hearing on an outline. I think that you should give us what they want as HUD has.

THE COURT: Well, it may be premature to expect them to have an order prior to discussion. Maybe now they are in a better position "to formalize it" than they were before today.

MR. POLIKOFF: We will be happy if your Honor prefers—no problem—to have drafted a specific proposed order before the hearing I ask for is granted [84] and held.

I would like to point out and I will make this as a parenthesis because I do have no objection to submitting to a proposed order, and I want to emphasize that. I want to point out that the traditional form of equity in the relief stage of the case at least in my experience is that the order grows out of the hearing rather than the other way around.

And in my personal experience it is not typical for a specific proposed order to be submitted as relief before the hearing is held. However, we have no objection to that.

THE COURT: I have never asked for any findings of fact before a hearing.

MR. MURRAY: Your Honor, I feel like I am in a Kafka plot.

Your Honor, on December 23rd the order wasn't drafted by us, it was drafted by the plaintiffs and contemplated a proposed judgment order to be submitted to the Court.

Now the plaintiffs did not submit such order. They've been given over eight months to do so and we come up, we fulfill what we felt was our obligation under your Honor's order, submitted a proposed judgment [85] order. Then the plaintiffs come up and say, "No, we're not going to submit it. We will submit a proposed outline for discussion and if your Honor approves that outline, then we will embody the principles of your approval in a proposed judgment order," and that's what I thought this conference was all about, your Honor.

THE COURT: The record will show that we had a conference. The record will show that I won't be back until September.

Good-bye, fellows.

MR. MURRAY: Your Honor, may we place all of this and continue it for further hearing just for the submission of the proposed order?

THE COURT: I haven't entered any kind of an order.

(Which were all the proceedings had and taken in the above-entitled cause on the day and date aforesaid.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed September 25, 1972]

[Title Omitted in Printing]

PLAINTIFFS' PROPOSED JUDGMENT ORDER

This matter coming on to be heard pursuant to this Court's order of December 23, 1971, directing certain of the parties to submit proposed final orders for comprehensive relief, and pursuant to the submissions of the parties as so directed, to hearings held with respect thereto, and to prior orders entered and hearings held in these consolidated cases, and the Court being fully informed in the premises, the Court now makes the following findings of fact and reaches the following conclusions of law:

FINDINGS OF FACT

* * * *

CONCLUSIONS OF LAW

Based on the foregoing findings of fact and conclusions of law, and upon the determination of the Court that the provisions of this judgment order are necessary to remedy the past effects of the unconstitutional site selection and tenant assignment procedures previously employed in the public housing system in Chicago,

IT IS HEREBY ORDERED:

I. For purposes of this judgment order,

A. "HUD" shall mean the defendant, Department of Housing and Urban Development.

B. "CHA" shall mean the defendant, Chicago Housing Authority.

C. "Local Housing Authority" shall mean any public housing agency as defined in 42 U.S.C. § 1402 (11), including CHA unless otherwise stated.

D. "Dwelling Unit" shall mean an apartment or single family residence within the "Urbanized Area" as hereinafter defined which is to be initially made available to and occupied by a low-income, non-elderly family, subsequent to the date hereof, directly or indirectly by or through a Local Housing Authority, whether in a structure owned in whole or in part by such Local Housing Authority (whether or not newly constructed) or to be otherwise made available for occupancy by or through such Local Housing Authority to such a family. "Dwelling Units" include "Leased Dwelling Units" as hereinafter defined.

E. "Leased Dwelling Unit" shall mean a Dwelling Unit in a structure leased or partially leased by a Local Housing Authority from any person, firm or corporation.

F. "Urbanized Area" shall mean those portions of Cook, DuPage and Lake Counties, Illinois, which comprise the Chicago Urbanized Area as such area is defined and determined in the 1970 census of the United States Bureau of the Census.

G. "Limited Public Housing Area" shall mean that part of the Urbanized Area which lies either within census tracts of the United States Bureau of the Census having 30% or more non-white population, or within the City of Chicago and within a distance of one mile from any point on the outer perimeter of any such census tract. "General Public Housing Area" shall mean the remaining part of the Urbanized Area. The terms "non-white" and "white" shall have the meaning given to such terms by the United States Bureau of the Census.

For purposes of this Section G, results of the 1970 census taken by the Bureau of the Census shall presumptively determine the non-white population of census tracts until results of a subsequent such census are officially published; provided, that any party may, on motion, offer evi-

dence as to the non-white population of any census tract for the purpose of rebutting such presumption; and provided further, that Dwelling Units located or proposed to be located in any census tract subsequent to official publication of the results of the last previous such census shall be taken into account in determining the population of such census tract, and for such purpose it shall be assumed that such Dwelling Units will be occupied by non-whites at the rate of two persons per bedroom.

H. "Public Housing Product" shall mean any thirteen or more Dwelling Units which are located (1) in the same structure, (2) on the same lot or parcel of real estate, or (3) on two or more lots or parcels of real estate which are contiguous to one another, or are separated only by streets, alleys, bodies of water, railroad tracks or the like.

II. Following the date of this judgment order neither HUD nor CHA shall authorize, approve, provide funds for or implement any plan or program for Dwelling Units to be located within the Urbanized Area unless such plan or program affirmatively requires that,

A. All Dwelling Units provided for in such plan or program shall be located in conformity with the provisions of Articles III or IV hereof, as the case may be, and

B. The activities to be performed in order to render such Dwelling Units available for occupancy (whether construction, purchase, rehabilitation, leasing or otherwise) shall take place at such times as will result in the location of such Dwelling Units in conformity with the provisions of Articles III or IV hereof, as the case may be.

III. CHA shall continue to use its best efforts to increase the supply of Dwelling Units within the City of Chicago as rapidly as possible in conformity with the provisions of the judgment order of July 1, 1969, en-

tered in this cause, as modified and enforced by subsequent orders also entered in this cause, provided that said order of July 1, 1969, is hereby modified by deleting Section E of Article III therefrom, and shall continue to take all steps necessary to that end, including making applications for allocations of federal funds and carrying out all necessary planning and development. CHA's Tenant Assignment Plan, approved by this Court's order of November 24, 1969, shall continue to be applicable to all Dwelling Units provided under this Article III. HUD shall cooperate with and assist CHA in every feasible way to the end that the supply of Dwelling Units in the City of Chicago may be increased as rapidly as possible in accordance with this Article III.

IV. CHA and HUD shall use their best efforts to the end that Dwelling Units shall be provided within the Urbanized Area outside the City of Chicago equal in number to 50% of the Dwelling Units provided from time to time within the City of Chicago under Article III hereof. Such efforts shall initially be exerted to the end of providing 750 Dwelling Units pursuant to this Article IV,. such number of Dwelling Units being a number equal to 50% of CHA's current reservation from HUD for Dwelling Units to be provided within the City of Chicago. Without limiting the foregoing,

A. CHA shall immediately use its best efforts to enter into written agreements with other Local Housing Authorities in the Urbanized Area outside of Chicago pursuant to which such other Local Housing Authorities will (i) make application to HUD for reservations of some portion or all of such 750 Dwelling Units to be provided in the Urbanized Area outside of Chicago, and seek to enter into appropriate cooperation agreements as provided in 42 U.S.C. § 1415(7)(b) or obtain other local approvals as provided in 42 U.S.C. § 1421b(a)(2) respecting the same, and (ii) promptly take all such additional steps, including carrying out all necessary planning and

development and making appropriate applications for federal finanical assistance, as will enable them to obtain and utilize such reservations to increase the supply of Dwelling Units in the Urbanized Area outside of Chicago as rapidly as possible in conformity with the provisions of this Article IV. Without limiting the foregoing, such agreements between CHA and other Local Housing Authorities shall provide that such other Local Housing Authorities shall from time to time apply to this Court for any orders they may deem necessary or desirable to enable them to so increase the supply of Dwelling Units, including without limitation such orders respecting 42 U.S.C. § 1415(7)(b) and 42 U.S.C. § 1421b(a)(2) as will enable them to so increase the supply of Dwelling Units in the Urbanized Area outside of Chicago without first obtaining the cooperation agreements or other local approvals provided for under such statutes. Copies of any such agreements between CHA and other Local Housing Authorities and of any such applications to HUD, cooperation agreements and local approvals made or given pursuant thereto shall promptly be filed with the Court.

B. To the extent such agreements between CHA and other Local Housing Authorities and such applications respecting such 750 Dwelling Units are not made pursuant to Section A of this Article IV within 180 days from the date of this judgment order, or to the extent thereafter actions are not diligently taken to provide such Dwelling Units as rapidly as possible, CHA shall itself immediately make application to HUD for reservations therefor. Such application shall be separate from and in addition to all other CHA applications to HUD for reservations for Dwelling Units, and shall be identified by CHA as being made pursuant to this Section B of Article IV of this judgment order. Thereafter CHA shall promptly take all such additional steps, includ-

ing making appropriate application for federal financial assistance and carrying out all necessary planning and development, as will enable it to obtain and utilize such reservations to increase the supply of Dwelling Units in the Urbanized Area outside of Chicago as rapidly as possible in conformity with the provisions of this Article IV. Without limiting the foregoing CHA shall from time to time apply to this Court for any further orders it may deem necessary or desirable to enable it to so increase the supply of Dwelling Units, including without limitation such orders respecting Ch. 67½ Ill.Rev. Stats. § 27(c), 42 U.S.C. § 1415(7)(b) and 42 U.S.C. § 1421b(a)(2) as will enable CHA to so increase the supply of Dwelling Units in the Urbanized Area outside of Chicago without first obtaining the contracts, cooperation agreements and local approvals provided for, respectively, under such statutes.

C. Dwelling Units provided pursuant to this Article IV shall conform with the following provisions:

(1) The construction of any Dwelling Units in any Limited Public Housing Area outside of Chicago shall not be commenced unless within three months following such commencement of construction at least 75% of the Dwelling Units on which CHA or another Local Housing Authority shall have commenced or caused to have commenced construction, and shall have continued or completed construction, shall have been located (at the time of commencement of construction thereof) in the General Public Housing Area outside of Chicago.

(2) No leased Dwelling Unit shall be made available for occupancy in the Limited Public Housing Area outside of Chicago (in addition to Leased Dwelling Units in such Area which on the date of this order are already

occupied), unless, within three months following such occupancy, at least 75% of the Leased Dwelling Units then occupied are located in the General Public Housing Area outside of Chicago; provided, that such number of Leased Dwelling Units located in the General Public Housing Area outside of Chicago may be less than such 75% to the extent Dwelling Units other than Leased Dwelling Units have been occupied, or are under construction which is continuing, in the General Public Housing Area outside of Chicago in excess of the 75% minimum requirement of Subsection C(1) of this Article IV.

(3) Neither CHA nor any other Local Housing Authority acting pursuant to this Article IV shall concentrate large numbers of Dwelling Units in or near a single location. Without limiting the foregoing, unless part of a development specifically designed to assist in achieving the purposes hereof as to which the Court by order shall have given its approval,

(a) No Public Housing Project shall contain Dwelling Units designed for occupancy by more than 120 persons, except that if it is impossible for CHA or any other Local Housing Authority acting pursuant to this Article IV to provide within such limitation Dwelling Units which it is otherwise capable of providing, and if it will assist in achieving the purposes of this judgment order, a Public Housing Project may contain Dwelling Units designed for occupancy by not more than 240 persons.

(b) No Dwelling Units shall be located in any census tract if, following such location, the aggregate number of apart-

ments and single family residences theretofore made available to low-income, non-elderly families, directly or indirectly by or through CHA or any other Local Housing Authority in such census tract would constitute more than 15% of the total number of apartments and single family residences in such census tract.

(c) No Dwelling Units shall be located in any municipality or in the unincorporated area within any township:

(i) if, following such location, the aggregate number of apartments and single family residences theretofore made available to low-income, non-elderly families, directly or indirectly by or through CHA or any other Local Housing Authority in such municipality or unincorporated area would constitute more than 4% of the total number of apartments and single family residences therein; or

(ii) if, within 180 days from the date of this order, a cooperation agreement pursuant to 42 U.S.C. § 1415(7)(b) or local approval pursuant to 42 U.S.C. § 1421b(a)(2) is voluntarily entered into or given on behalf of such municipality or unincorporated area that provides for a number of Dwelling Units to be located therein in accordance with the provisions of this Article IV at least equal to 2% of the total number of apartments and single family residences therein, and application is made to HUD by a Local Housing Authority for a reservation for such number of Dwelling Units to be located in such municipality or unincorporated area, and

thereafter appropriate actions are diligently taken to provide such Dwelling Units as rapidly as possible.

(d) No Dwelling Units shall be provided above the third story in any structure except for families without children and except Leased Dwelling Units in a structure in which the number of Dwelling Units aggregates no more than 20% of the total number of apartments in such structure.

(e) Such 750 Dwelling Units, and the aggregate of all other Dwelling Units to be provided under this Article IV, shall be located among the urbanized areas of Cook (outside of Chicago), Dupage and Lake Counties in substantially the proportion 6 to 2 to 1.

(4) CHA's Tenant Assignment Plan approved by this Court's order of November 24, 1969 shall be applicable to all Dwelling Units provided under this Article IV, except that "municipality or unincorporated area within any township" shall be substituted for "community area" therein.

V. CHA and HUD shall affirmatively administer their respective responsibilities under state and federal law in every respect (whether or not covered by specific provision of this judgment order) to the end that the supply of Dwelling Units in the Urbanized Area shall be increased as rapidly as possible in conformity with this judgment order.

VI. On the 15th day of March and September of each calendar year following the date of this judgment order, CHA and HUD shall, respectively, file with the Court and serve upon counsel for the plaintiffs a report of the activities carried out to implement the provisions of this judgment order. Such reports shall be prepared in such manner as to inform the Court as fully as possible

concerning the progress being made in, and the existence of any obstacles to, such implementation, and shall include any recommendations for further action as will in the opinion of the reporting party aid in such implementation.

VII. This Order shall be effective from and after the date hereof and shall remain in force and effect until an aggregate of 60,000 Dwelling Units has been provided pursuant to the provisions hereof and of this Court's judgment order of July 1, 1969, entered in this cause.

VIII. This order shall be binding upon HUD and CHA, their officers, agents, servants, employees, attorneys, and their successors, and upon those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise.

IX. This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed developments designed to achieve results consistent with this order, material changes in conditions existing at the time of this order, or any other matter.

ENTER:

[Not Signed]
United States Judge

Dated: ——————————, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FROM TRANSCRIPT OF
SEPTEMBER 28, 1972

* * * * *

[132] PHILIP M. HAUSER,

called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POLIKOFF:

Q State your name, please.
A Philip M. Hauser.
THE REPORTER: Spell that, please.
THE WITNESS: Hauser, H-a-u-s-e-r.

BY MR. POLIKOFF:

Q What is your occupation, Mr. Hauser?
A I am a professor of sociology and director of the Population Research Center at the University of Chicago.
Q What is the nature of the current work you do in those two capacities?
A Well, I teach demography, conduct research in the general field of population and urbanism.
Q What is your education, briefly?
A I have a Ph.D. from the University of Chicago, two honorary degress, an LL.D. from Loyola University and an L.H.D. from Roosevelt University.
Q Can you quickly give us your past employment [133] history.
A Well, I started teaching back in 1929, spent some ten years in Washington where I served in the Bureau of the Census, became Deputy Director of the Census, came back in 1947, was Acting Director of the Census in '49 and '50, served also as Assistant to the Secretary

of Commerce and Director of the Office of Program Planning of the Department of Commerce, served as U.S. representative of the Population Commission of the United Nations, and have, in general, stayed at the University of Chicago since my return in 1947.

Q Have you authored any books or articles in the field of population trends or demography?

A I have, more than a dozen in the way of books and quite a number of articles throughout—technical journals.

Q Are you a member of any professional societies?

A Yes, quite a large number.

Q Do you hold an office in any of them?

A Yes. I am a past president of the Population Association of America, of the American Statistical Association, of the American Sociological Association, Sociological Research Association—

Q And others?

[134] A And others.

Q Have you served the City of Chicago in any way?

A Yes, I have served as a consultant to the City of Chicago, the old Department of City Planning, the Department of City Planning and Urban Development, as its name has changed, was a consultant for the report to which you referred a short while ago on the Comprehensive Plan for the City of Chicago.

Q You are referring to this blue covered document that is in evidence as Plaintiffs' Exhibit 9 of April 5th?

A That is right. My name is listed as a consultant at the end of that volume.

Q Are you generally familiar, Professor Hauser, with the judgment order that was entered in this case in 1969, and particularly with the three to one location ratio provision and the buffer zone provision of that order?

A I am. I have read the order and I have read what has happened about it since in the press.

Q I am sorry?

A As reported in the press.

Q Are you familiar with the—well, as Judge [135] Austin normally would have told you at that point, you can't rely on that as—

A Well, I read the order itself.

Q The order itself you can rely on.

A Right.

Q Are you generally familiar with U.S. Census statistics for 1960 and 1970, particularly as they relate to Chicago's white and non-white population?

A I am.

Q According to the 1970 Census figures, Professor Hauser, what is the white and the black population of Chicago?

THE COURT: Percentagewise you mean?

MR. POLIKOFF: Both, absolute and percentage.

THE COURT: All right.

BY MR. POLIKOFF:

Q If you have them.

A I have them.

Q And you are referring to some notes, are you, at this point on the figures?

A Right. I am reading from tables taken from the census reports.

Q Thank you.

A The total population of the City as of 1970 [136] was reported as 3,366,000 and some.

The white population was 2,207,767.

The Negro population was 1,102,620.

Q What are those percentages for Negro and white?

A The white population made up 65.6 per cent of the total in 1970, and the Negroes 32.7 per cent. The remaining 1.7 per cent to make 100 per cent were other races.

Q What percentage shift does that represent for white and blacks since the 1960 Census?

A Within the decade from '60 to '70 the black population increased by 35 per cent, while the white population diminished by 18 per cent.

Q How is that increase in the black population accommodated within the City in terms of residents?

A Well, the pattern between 1960 and '70 was essentially the same as all the time we have been tracing it in my research center since 1920, and that is through an

expansion of what was already predominantly a segregated Negro area into adjoining zones.

This has continued from the time the Negro population first came to the City of Chicago, and between '60 and '70 the black population increased in precisely the same pattern that it did in preceding [137] decades.

Q You referred to, I think, adjacent zones, is that—

A I used adjacent zones—

Q You mean geographically

A Adjacent city blocks, adjacent census tracts, adjacent communities, to refer to all three of the area units in which we divide Chicago.

Q And by expansion you mean the changeover, the transition in such a zone or neighborhood from predominantly white to predominantly black population?

A That has been the basic pattern.

The black population has increased in total number by reason of a whole series of factors, including the limited housing market for blacks in Chicago. The expansion has necessarily been out of and immediately adjacent to the areas already black.

Q Why is the location of the neighborhood you are talking about relevant, the immediately adjacent factor that you referred to?

A Because that has been the line of advance, the avenue of expansion of the black population with increased numbers of blacks, and the immediately adjacent area to where the Negro already resides is therefore [138] the critical area subject to the massive transition to which, as a matter of fact, the Comprehensive Plan for the City of Chicago refers.

Q Well, is the phenomenon, the social phenomenon different in the neighborhood that is not immediately adjacent to an area already largely occupied by blacks?

A Very definitely so. The evidence indicates that the areas beyond the immediately adjacent areas tend to be relatively relaxed and are not subject either to penetration or to the whole series of processes which result eventually in succession, that is the white neighborhood becoming entirely black.

There is an interesting element involved here and a rather ironic one, and that is that there is no doubt, and this is not unique to the City of Chicago, that resistance to integration and residential segregation means that white communities, neighborhood after neighborhood, have been wiped out as the black population has increased as if struck by a tidal wave. It is an ironic fact that to refuse to integrate on a residential front results in a complete elimination of the neighborhood. This has been the pattern since 1920 and it is still going on.

Q Incidentally, Professor, is Chicago a residen- [139] tially segregated city or relatively speaking, that is, compared with other cities, relatively unsegregated residentially?

A Well, we have calculated segregation indexes for Chicago and most cities and metropolitan areas of the United States over many years. Chicago is the most segregated of any of the large northern cities in the United States. Actually, Chicago's segregation index has gone up while segregation indexes of other cities of a million or more have gone down.

As of 1970 the segregation index, which I had calculated only yesterday by census tracts, is over 90, and what that segregation index means is that in Chicago, as of 1970, it would be necessary to move more than 90 per cent of the black population if their distribution was to match that of the white population.

Q Is that index for Chicago higher than it is for other cities in the north?

A Oh, yes. New York, for example, has an index of about 78.

It is higher than that of any city of a million or more and higher than any large city in the north.

Q Now, Professor Hauser, based on the Chicago [140] demographic facts as you know them to be, and census figures, do you have an opinion as to what the effect would be of eliminating the buffer zone provision from the Court's order of July 1, 1969?

MR. O'BRIEN: Your Honor, I object to this. There has been no foundation laid for asking this witness a

hypothetical question directed to low income family public housing.

THE COURT: The objection is overruled.

BY THE WITNESS:

A Yes, I have an opinion.

There is no doubt in my judgment that the effect of the elimination of the buffer zone would be precisely the same as that which has characterized housing policy through the CHA in this city ever since the CHA was created, of reinforcing the pattern of racial segregation.

The elimination of the buffer zone simply means that there would be business as usual with black penetration in a white community resulting in complete inundation and this massive transition from white to black population.

BY MR. POLIKOFF:

Q Is it possible, Professor Hauser, that that [141] will happen anyway?

A This is quite possible because the problem of segregation, as we are all quite aware, is a quite complex one.

The two elements which probably operate more powerfully than any other forces, and what has occurred in Chicago and in other central cities in the metropolitan United States are those forces implicit in segregated housing on the one hand and segregated schooling on the other. In the City of Chicago the policy and public action have been such as to definitely reinforce the racist segregated pattern that we have had ever since we were —had diverse population groups come into the area.

Q In your opinion, Professor, does it tend to maximize or deminimize the chances of preventing it from happening in this buffer zone area if we keep the buffer zone provision in the order?

A In my judgment all the elements of Judge Austin's order represent, as I see it, a remarkably fresh basis for hope that the trend towards the apartheid society we already have, more so in Chicago than in any other large city in the United States, that the trend toward an apartheid society might be halted or at least [142] delayed.

I think that order, as I understand it in the context of population distribution in the United States, holds forth a promise of something interrupting what is already and is increasingly becoming completely an apartheid society with black central cities surrounded by lily white fringe white population.

Q Do you have the same opinion with respect to the effect of a reversal of the 3-to-1 ratio provision of the order?

A Well, the reversal of the 3-to-1 ratio would have an interesting consequence. With a segregation index of over 90, the reversal of the 3-to-1 ratio would in effect say that 75 per cent segregation is okay. It would tend to reinforce in that direction. So that a reversal of the order so that it would be to some extent an improvement over the facts as they now exist actually would tend to continue to reinforce the segregated community we already have.

A 3-to-1 ratio—there is nothing sacred, incidentally, about those numbers, it might be 2.5, 3.5. The ratio is obviously an arbitrary one.

What is significant and what is, I think, refreshing, if we are to assume that the United States [143] is to live in an integrated society in which all minority groups have the option to live where they please, a pluralistic, democratic society, what is significant about this ruling is that it embodies a policy which would break the established pattern which CHA—and may I say the Board of Education on the educational front in Chicago have been consistently reinforcing it now over the last several decades.

MR. POLIKOFF: No further questions, your Honor.

THE COURT: Any cross?

MR. O'BRIEN: Yes, sir.

First of all, your Honor, before proceeding to cross, I move to strike it all as apparently being offered on our motion which is not before the Court and which your Honor said he wouldn't hear. Your Honor said that. I read it. So I don't know why this—

THE COURT: I said I wouldn't hear it in August.

MR. O'BRIEN: And I was never served with any notice that they were calling it up.

I made by objection and I will proceed with cross subject to my objection.

[144] THE COURT: All right.

The motion to strike is denied.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q Professor Hauser, you stated, I believe, that the CHA has been long and well known for racial segregationist policies; is that your testimony?

A Well, you are using words other than what I used.

I don't think the CHA created racist segregated policies in Chicago, but there is no doubt in my mind that the policy of CHA and the actions of CHA have reinforced that policy and that fact.

Q You are aware, sir, are you not, that for many years and up until this year, as a matter of fact, final approval of all sites selected by the CHA was made by the City Council?

A I am quite aware of that, and I would certainly say CHA was merely the instrumentality.

What you are getting at now is why do we have this policy. I would say that responsible is the superb nonleadership of the Mayor of the City of Chicago, Mayor Daley, the City Council which he controls, the [145] CHA commission which he controls; this is the whole sequence of events within a framework, of course, of federal law.

Q Now, sir, are you aware that in this case Judge Austin held as a finding of fact a few years ago, true as the law of the case, and this is at 296 F. Supp., page 914, "In view of CHA's persistent selection of white sites at the initial stage before the preclearance procedure and the candor of its officials on deposition, these statements are undoubtedly true," and the statements held by Judge Austin to be undoubtedly true are the statements that CHA officials never entertained racist attitudes and that the racial character of the neighborhoods

has never been a factor in CHA's selection of a suitable site."

Were you aware of that finding, sir?

A I have not read it and I have not been particularly aware of it in those terms until you just said it, but—

THE COURT: I am sure that Mr. O'Brien wouldn't mislead you, that that is the order.

THE WITNESS: No.

BY MR. O'BRIEN:

Q You just never heard that before?

[146] A No, I haven't heard that, but may I say that I know that, I know that CHA has acted within the framework which required approval of sites by the City Council.

Q Now, sir, you testified on direct examination as to the effect of shifts in black population and how when there is a leapfrogging effect your studies reveal there tends not to be this collapse of a neighborhood overnight, turned from white to black—I shouldn't use the word "collapse"—overnight change.

A I didn't so testify. I expressed it as my judgment that where there is such a leapfrogging that it may well have the effect of slowing down any possible exodus.

As a matter of fact, I think if one were to put this in its total context, if it became perfectly clear, and this was a matter of public policy, as is stated in the Comprehensive City Plan of Chicago, beautiful prose which has been completely ignored, if it were clear that there was absolutely no community in the City of Chicago to which blacks, and including low income blacks in the public housing was immune, then I think the question of leapfrogging and the question of exodus might well diminish. Moreover, that would even be more the case were it perfectly clear [147] that there were no escape hatches in the entire metropolitan area.

In my judgment it is possible to deal with this problem within the City of Chicago, but an ultimate final solution of the problem of integration can come only if we

recognize the reality of the entire metropolitan area as being the functioning unit of Chicago.

We are still plagued with Eighteenth Century forms of City Government, of which the City of Chicago is one horrible example.

Q You are aware, sir, are you not, that the order, the basic judgment order in this case, says in effect that when a unit or units, let's say a three-flat is built in an area that is white, the general area, that neighborhood residents are entitled to I believe it is 50 per cent priority. You know that?

A Yes.

Q Now, sir, do you know of any studies that instead of talking in terms of black and white, the impact of leapfrogging, introducing into new neighborhoods, et cetera, do you know of any studies, sir, that deal with public housing being introduced in a middle class or upper middle class neighborhood?

A Yes, there are some such studies and some [148] that have worked out very well.

Q Do you recall any, sir?

A There are communities in Baltimore and there are communities in seven other parts of the country, which I would have to consult my notes that I don't have here, in which this has occurred and with success. In fact, there is a community in Illinois, I believe Rockford, where there has been such successful integration as well.

Q Yes. Do you know of any situation involving a city the size of Chicago, surrounded as it is by the large all-white metropolitan suburban area?

A None to my knowledge; none to my knowledge.

As I said earlier, we are here on a frontier and it is not possible to answer that type of question because the pattern of not only Chicago but the U.S. has been of a racist pattern in which blacks have been segregated in central cities, and to me the significant thing about this case is that we may have a breath of fresh air which might point to something that would break the apartheid society we created.

Q Do you know of any studies, sir, that deal with the subject of fears other than racial fears, fears, for in-

stance, of an invasion of a middle class [149] neighborhood by what for lack of a better term I would call lower class people.

A Yes.

Q And there are students, are there not, in this general area of sociology who believe that class fears may be as important, if not more important, than racial fears, for whatever irrelevant and irrational reasons.

A There are, yes.

Q And on your direct testimony you were basing your views on the black and white situation.

A Yes.

Q Do you know, sir, for instance, the percentage of people on welfare that live in Chicago Housing Authority units?

A Oh, I don't happen to have that figure in mind. I know about 21 per cent of all black families in Chicago are on welfare, twice the load, twice the rate or incidence which is true for whites, and in CHA—I published a book on this, incidentally, in 1956 in which I have the data at that time. I don't happen to have it in mind at the moment. My guess would be perhaps a third to a half and perhaps even more.

[150] Q Do you have an opinion, sir, as to the effect of the introduction of a very substantial number of units of public family housing in white neighborhoods, middle class neighborhoods of Chicago, where there was not anywhere around Chicago any kind of a public housing program?

MR. POLIKOFF: Just a moment, please.

MR. O'BRIEN: I am just asking if he has an opinion.

MR. POLIKOFF: I would like Mr. O'Brien to define what he means by "very substantial" so the question will be clear to me and the witness.

THE COURT: And what "anywhere around Chicago" means.

BY MR. O'BRIEN:

Q Let's say 10,000 in the City of Chicago, none for Evanston, none for Skokie, none for Highland Park,

Glencoe, Flossmoor, Winnetka, Barrington Hills, et cetera. That is what I mean.

A Well, I have an opinion and I think I should state on what it is grounded. The opinion is, and here again I am describing what has been the actual pattern and the pattern that still exists throughout metropolitan United States, including the Chicago [151] metropolitan area.

The pattern is one—and I can go into great detail if the Court should desire—by which as we say in sociology the population over time becomes stratified in space by social economic status, and that can be translated into English. What it means, in every metropolitan area in this country them that has it has always lived farthest out, because farthest out is where the newer, more desirable housing was and the housing market is a competitive market. People are distributed in accordance with their ability to buy the type of housing they desire.

I am familiar with the attitudes of resentment on a class basis. In fact, there are some cases pending now, as I understand it, that are going to raise the same questions about whether it is legal to exclude people on the basis of income or class. The courts have struck down segregation on the basis of race, language or origin and the economic one is before the Court.

Now, my point is this, that any middle class white community that resents, and I am quite sure you are right when you imply they will resent the ingress of lower class, and particularly black lower class, [152] which is regarded as something worse than just lower class, and I don't think there is much debate about that, is very much in my judgment in a position of the chap who committed matricide and patricide and then threw himself on the mercy of the Court because he was an orphan. Now, all these evidences of pathology which are implicit in your question and which are admittedly there, in the black community, are the product of the smugness and the complacency and the racist policies of the middle class white community to which you are referring. And the question is, are we going

to consistently follow that policy or are we going to break it, and Judge Austin's order is one way to break it.

THE COURT: My order, Mr. Hauser, had to do with first making a determination that there had been discrimination in the City of Chicago by the CHA over a 20 year period, and the next in regard to units that that were built for residents of the City of Chicago upon the request of the City to the Government for money for that purpose, and as a remedy all my order did was to require that from now on you can't do it like you did. That is all my order did. I am not building any [153] houses. I have no money.

MR. O'BRIEN: Neither does CHA.

BY MR. O'BRIEN:

Q Well, Professor Hauser, you have mentioned the statistics with respect to the total population of Chicago and the increase in the percentage of blacks and the decrease in the percentage of whites. It is true, is it not, sir, that in general the whites are going to the suburbs?

A Yes, towards the periphery of the City first and into the suburbs since the City has been reasonably filled up.

Q And forgetting the reason, putting aside all the reasons for the moment, is it not true, sir, that irrational fears of black people has caused a substantial amount of this migration of whites?

A In part, but remember this, that the actual outflow of population from the inner city, first to the peripheries and as the City filled, to the outlying suburbs, this has been true ever since Chicago first appeared in the Census in 1840, and before there was a racial problem you had precisely the same kind of movement outward by reason of the rapidity of the growth of the City, the fact that the newer and most desirable [154] housing was always farthest out, and while there was still a lot of land within the City, this same movement outward was still taking place within the City, and over time, as a matter of fact, spurring

this what I think is the more basic economic motivation has been various ethnic and racial motivations. There was a time when people fled because they didn't want to live with the Irish, they didn't want to live with the Poles, they didn't want to live with the Jews. At the present time they don't want to live with the blacks, but the economic base of this, the fact that better housing and along with it, until recently, better housing and along with it, until recently, better schooling and so on, was in the suburbs is part of what led to this movement.

Q And so the rise of economic status, the assimilation of various ethnic groups you think has contributed, it is hard to measure how much, to this movement that you referred to?

A Oh, no doubt about it.

Q Yes, and also contributing to the statistics about the population of the City of Chicago, sir, has involved, has it not, the immigration from other parts of the country of black citizens to the City of Chicago, or has that died off? I am not sure.

[155] A Well, inmigration, we call it.

Q Yes?

A Inmigration across national frontiers, yes, this has sloughed off.

If you go back to the decade of the forties, during the War, the increase in black population was about 75 per cent inmigration and only about 25 per cent natural increase, excess of births over deaths. That has sloughed off to where it was less than half in the decade of the fifties, and I haven't seen the latest—there is a little calculation involved to do this—but the chances are that the increase in black population through inmigration during the sixties, between '60 and '70, was probably less than a third, probably less than a fourth.

Q Now, sir, drawing upon your experience in sociology, the study of demography, geography, population trends, teaching and study, wouldn't it be true, sir, that what I will call for lack of a better term a blue collar, lower middle class neighborhood that is white

and composed of three-flats would react more adversely than would a university community of upper middles, whites, three-flats, to the introduction of a three-flat building for low income public housing? Do [156] your studies indicate that people react differently depending on who they are, what their background is?

A In all probability. But then we must take—

Q In all probability what, sir?

A In all probability that is correct, that is that you would get the more hostile reaction from the blue collar worker than from the more educated and higher, more affluent families.

However, I think this must be qualified by this consideration, and that is if the public housing were to follow the pattern that it has in Chicago and elsewhere in the United States, unlike that, for example, in the United Kingdom where public housing is built so that everybody knows it is public housing and it is built in a manner incompatible with the style, the architectural style, the pattern of life and so on, in such a community—now, housing doesn't have to be in that pattern, so I would say part of the problem here is that the housing program in Chicago and in this country as a whole has not been particularly astute from the standpoint of trying to get it accepted by the broader non-public housing population.

Q Yes. And you are aware, sir, I take it, of the current new look in public housing, if the [157] money ever comes through, et cetera, of the Chicago Public Housing Authority. You have seen those brochures of those houses that are indistinguishable, I think, from ordinary mine run housing.

A That would help, there is no doubt about that.

Q Now, sir, have you been involved as a consultant at any previous stage in this matter with either side or the lawyers for either side?

A Yes, I have been consulted by Mr. Polikoff in the past with respect to what the Census data are, the distribution of population, concentration, segregation indexes, and so on, and I have made the facilities of my

population research center available to him, as I do to anyone who makes inquiry for it.

Q And were you consulted in connection with the terms of the 1969 judgment order at or about the time prior to its being signed by the Judge?

A Yes, yes, I was.

Q As a matter of fact, was the text of the order as proposed to the Judge submitted to you before it was submitted to the Judge, so far as you know?

A Oh, I saw some drafts along the way. I don't know whether I saw the draft that was submitted to the Judge.

[158] Q And did you, sir, participate in the drafting or any part of the drafting of the judgment order?

A Not the drafting, although I provided information on the basis of which the actual statistical determinations and so on were made, yes.

Q Did you, sir, discuss the 3-to-1 ratio prior to July 1969 with Mr. Polikoff, and the buffer zones?

A Yes.

Q And did you in fact make recommendations to Mr. Polikoff with respect to the buffer zone and the 3-to-1 ratio?

A In terms of the general principles, yes, not the specific ratio. As I said earlier, this is arbitrary. It is the principle that it embodies. Yes, this was discussed.

Q Did you discuss 2 to 1 with him, do you recall?

A I am afraid that at my age that kind of detail, several years ago, is just not—I can't be responsive to it. We may have. We talked about various ratios. Whether it was 2 to 1 or not, I can't recall.

May I say one can make a case for 2 to 1 or 4 to 1. It is a question of the principle that is involved and the extent to which you want to support the principle.

[159] Q Now, sir, we discussed buffer zones in a general way and we have discussed the impact of this transitional area; have any studies shown what area it is that can be deemed a transitional area? One reads about a certain street being considered—about Ashland Avenue, I have read about it in the paper. Ashland Avenue is about 40 feet wide, I presume, not a mile.

A Well, may I say that over the years the University of Chicago, and in one of the units which I direct, the Chicago Community Inventory, the specific one is now over 25 years old, has used Chicago as a laboratory and we have made very intensive studies of the manner in which the City was occupied by newcomer populations, the white ethnic groups, and also more recently the black groups, and these books, I have three of them here done by former students and colleagues of mine in my research center and for which I have written the forewords, trace the story; for example, the Negro occupancy in the City of Chicago since 1920.

A series of maps I think will answer your question perhaps more eloquently than anything I might say.

Q Is there one particular map, sir, that you [160] think would be an eloquent answer?

A Yes. There is a whole series of maps. This shows the Negro population in the City in 1920.

Q No, sir. My question is, you have used the phrase "an area of transition."

A Yes.

Q The Court order of 1969 sets up what we call a buffer zone which is one mile.

A Yes.

Q Could it not be, sir, three blocks and serve a reasonable purpose as a buffer zone? Could it not be a half a mile?

A Here again this is an arbitrary thing. You could argue perhaps it should be nine-tenths of a mile or 1.1 mile, perhaps as low as a half a mile. I would be suspicious about anything as small as a half mile for this reason; a zone in transition in Chicago, as every successive census has shown since 1920, an area that was part black, census tract, let us say, or block, part black in one census was integrated only until the next census came along by which time it was all black, and that is the process by which blacks have occupied that part of the city which they now occupy. There is the immediately adjoining zone—partly because of [161] restrictions, there was restrictive covenants before the Supreme Court struck that out, there has been since and there still is operating

quite a separate housing market for the black community and for the white community in Chicago or the suburban community, and those distinct series of factors have made it possible in the main for black population to expand as its numbers increased only into adjoining areas. This has been a pattern since the twenties.

Q I take it you believe and deem it to be valid when discussing population movements and trends of the sort we have been discussing to deal with factors such as ethnicity, meaning white ethnics, income class or class of person as well as color, do you not?

A Oh, yes.

Q And, sir, do you know of any, let us say, upper middle class black neighborhoods in the City of Chicago?

A Yes, yes, the south of where I live in Hyde Park, Avalon, South Shore, beyond that farther south, yes, Kenwood, which is to the north of the neighborhood in which I live.

Q Do you know, sir, whether those inhabitants [162] of those neighborhoods have tended to behave in the same way as whites of their same class with respect to movement to the suburbs?

A In general, yes, although on a much more limited extent. It is a rather interesting thing, such studies that have been made indicate that the middle class-upper class black, when he comes into a community generally doesn't follow quite the same patterns as the white he replaces, he is a notch above them because he has had trouble getting there in the first place. He hasn't had the freedom that his own economic status may have provided him with. And then there has begun an exodus to the suburbs, in fact something over 70 per cent increase in black population occurred in the suburbs of Chicago between 1960 and 1970, but from a very low base. There is still only about three per cent of the suburban population is black, even though they have had a very large percentage increase.

Q Is not that percentage increase of the black population in what are deemed the suburbs been fairly significantly affected by the creation of all black suburbs?

A Yes, to some extent, and in the suburbs, in [163] keeping with the pattern within the city you have had also, if you are talking about the predominant mass of the black population, you still find segregation in the suburbs as well, yes, although there are increasing evidences of integration particularly on the part of the really affluent blacks who can, say, buy their way into Glencoe where you do have this sprinkling and you do not have segregated patterns.

Q Now, sir, do you recall any discussion of the buffer zone with Mr. William Barry of the Urban League?

A Oh, I don't recall the precise discussion we had, no, although Bill Barry and I have talked about this many times. We see each other quite a bit.

I don't know what particular statement you are referring to.

Q Now, sir, is there such a community as the University of Chicago community? Is that a fair description of some neighborhood on the south side of Chicago?

A Oh, in a kind of a literary way I suppose. We divided the University of Chicago to—really gave nomenclature to and divided the City into 75 communities, as they are called, one of which is Hyde Park, another Kenwood to the south of Hyde Park, Woodlawn, but to the [164] extent that there is a university community, and I suppose one can say there is because about 80 per cent of our faculty lives within walking distance of the university and the concentration is especially heavy in Hyde Park.

Q Now, sir, trying to put aside your own particular views which you have expressed very well, is there, in this community that you described, is there a significant amount of public housing, if you know?

A "Significant" is a weasel word. There is some public housing. There has been some dispersed public housing put within about a half mile of where I have my house and this is part and parcel of the new policy.

Is 47th Street significant? You have got some new housing going up there for both middle income as well as low income people.

State Street is within a mile and a half away. Certainly that is not in the Hyde Park area but of course, State Street, you have this heavy concentration. You have got some dwelling authority construction right on the midway just at the edge of the Hyde Park area.

I think the answer is no, there isn't any [165] significant public housing, and that is in keeping with what is true of what have been predominantly white neighborhoods.

Q Now, sir, with your professional background you are aware, are you not, of the fact that on the south side of Chicago and the west side of Chicago, areas that fall within the limited public housing area, there is at present, for whatever reason, vast acreages of totally vacant land, is that not true?

A That is true.

Q And you are aware, sir, are you not, that at one time in the recent past most of that vacant land was occupied by structures in which people lived and had housing on it, some time in the recent past, are you not?

A Also true.

Q And isn't it true therefore, sir, that in the area that falls within the limited public housing area there has been in the recent past a diminution in the supply of housing?

A That is true.

Q Due to a whole host of programs?

A That is true. It is true throughout the country, by the way.

[166] Q It is true generally, sir, is it not, in the central city, the older part of cities?

A Yes.

Q And in Chicago that area in which all this vacant land exists that we have been discussing is in the limited housing area?

A Yes.

Q Now, sir, do you deem it relevant or irrelevant—strike that.

It is a factor, is it not, sir, that there tends to be flockings of people, for whatever reason, that we have historically neighborhoods of Italians and Greeks and

Irish and Germans and Filipinos and Puerto Ricans and blacks?

A This is true, though I should say that now you are in the realm of what we have conducted a number of researchers right in Chicago and the segregation indexes of these white ethnic groups was never more than about half as high as the segregation index of the blacks. Moreover, as we have traced their movements over time, and we can show you quite a bit of detail on that if you want them, it is true that over time you get to a second generation, a third generation where the visibility of the newcomer white ethnics [167] has pretty much been dissipated.

They have had the option to continue to live in such enclaves or to leave their enclaves and live in, say, an integrated fashion. In the second and third generation of blacks in Chicago they have not had that option. They do flock together. In fact, to my mind it is ironic that much of the debate about open housing, and we have had bloodshed literally over it, was in a sense completely unnecessary because were there complete freedom to move, in my judgment the black would still predominantly live as an enclave, but the difference is that they have not had and do not yet have the option to move out as the white ethnics had.

Q Right, but your studies suggest, sir, based on other groups, as you just stated, I believe, that there is this tendency among blacks as other groups that even given freedom, mobility, you can anticipate a very substantial amount of flocking without putting a number on it.

A That is right, but then the other half of it is that you can also anticipate a substantial proportion who want the option to move out. You have got both in every ethnic and every racial group.

Q Now, isn't it true, sir, that the flight to [168] the suburbs, which I will call it for lack of a better term, will be hastened and not lessened by the introduction of thousands of low income family public housing units in the white neighborhoods of Chicago without introducing any such units into the suburbs around Chicago?

A Well, that is a hypothetical question and my guess is this might well be the case, which is why I said what I said earlier about the problem essentially in the long run having to be a metropolitan-wide problem.

On the other hand, the exodus is, again, in sort of literary language, you know, we always talk about the flight from the city when the fact is that every city, and especially Chicago which has been much studied in this respect, has witnessed the population moving outward from the center as the economic status rose, and when we talk about the flight to the suburbs or flight from the city, we are talking really about a half truth. It is a half truth, as Oliver Wendell Holmes, your Honor, one time said, "A half truth is like a half a brick, you can throw it further," and it is circulated pretty widely. But all the time the people were moving outward others were coming in and the net effect was the City continued to grow.

[169] Now, moving out entails quite a bit of problems for any family in terms of investment, in terms of financial ability, schooling for children, interruption of friends, et cetera, et cetera; so that I think all in all, in my judgment, the difference between having dispersed public housing within the city, if it were clear there was no community within the city, while it might accelerate it some, I think it would be a relatively minor factor in the more basic forces that account for the distribution of population within the city and within the entire metropolitan area.

Q Professor Hauser, are you a member of the American Civil Liberties Union?

A No.

Q Have you been or have you ever held any post with the American Civil Liberties Union?

A I have never held any post, but I don't think I have ever been a member. I have made contributions from time to time to the Civil Liberties Union. I don't regard it as a particularly dangerous and undesirable organization. I am not afraid of them.

Q Are you aware, sir, of any groups of citizens that—I think you were in the courtroom this morning—that are

suggesting sites to the Chicago Housing [170] authority?

A Only from what I have seen in the press. I have no direct knowledge or special knowledge about it at all.

Q Do you know of any group composed of people connected with the University of Chicago who are active in that activity?

A No, although I know groups that might conceivably be engaged in such activity without my knowing about it.

I have spent much of the last few years, about half the year in Asia or Europe and so I am not in complete touch with what is going on immediately, but if there is anyone doing it in Chicago, my guess is that it would be through our center for Urban Studies, and you might inquire there. I just don't know, which is not equivalent to saying it is not going on.

Q I see. Thank you.

MR. MURRAY: Your Honor, at this time we will reserve any cross examination from the Department of Housing and Urban Development of Professor Hauser. We have received answers to our interrogatories concerning the Metropolitan Plan that was filed with this Court on September [171] 25th, 1972, and which has designated Mr. Hauser as an expert witness at the hearing on October 24th, 1972. Rather than prolong this hearing and since we have just received this information we would like to reserve any cross examination to the extent that any of his testimony is relevant for purposes in support of plaintiffs' order on metropolitan-wide housing program.

THE COURT: All right.

MR. POLIKOFF: I have no further questions.

I have one last witness who will be five minutes, your Honor.

THE COURT: All right, put him on.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FROM TRANSCRIPT
OF NOVEMBER 27, 1972

* * * *

[12] MR. POLIKOFF: * * * Let me turn to the second of my four points; what is the evidence going to show, in a very general way, about the issue as I have now stated it? The issue again, what is necessary or appropriate to bring about this full opportunity, this option that I mentioned?

There are two proposed orders before Your Honor. Each of them is supposed to provide full relief. The Plaintiffs' order is a comprehensive plan which involves the HUD Public Housing System in the Chicago urbanized area. It is a way of making low income housing opportunities in nonblack neighborhoods available to members of the [13] Plaintiff class in addition to the housing opportunities that are to be made available within the city under Your Honor's previous order.

THE COURT: This, however, embraces, unquestionably, on a non-voluntary basis, right?

MR. POLIKOFF: Well, it depends on what you mean by "non-voluntary".

THE COURT: Well, I mean, there has been 500 openings for 41 months, none of which have been submitted to the Court. That was on a voluntary basis.

MP. POLIKOFF: Now, which openings is Your Honor referring to?

THE COURT: I am talking about the 500 that could be placed in the—outside the city limits.

MR. POLIKOFF: I see. That is correct, Your Honor. In that sense it is on a non-voluntary basis.

THE COURT: I mean, this, of course, is on a voluntary basis.

MR. POLIKOFF: CHA, under the order, would be obligated to try to put the housing out there. Under the

order it simply, as you put it, is voluntary with them whether to try or not, that is correct.

THE COURT: Well, there has been some evidenece from CHA that they, from time to time, were [14] endeavoring to find some units outside the city limits.

MR. POLIKOFF: Without success.

THE COURT: Without success, and of course, it was their position, being a creature of the city administration, to put as many of them out there as they could and thus make everybody inside the confines of the City of Chicago happier.

MR. POLIKOFF: So far they have put none out there.

I want to point out one additional difference between the voluntary provision you are referring to and what is in the Plaintiffs' proposed order.

THE COURT: Well, I am concerned about if there is no more success than there has been for the last three and a half years, you are not going to let it rest on a voluntary basis, I don't think.

MR. POLIKOFF: Well, I have already said it is not voluntary in the proposed order, but there is one additional difference—that is it is not voluntary in the sense that CHA is obligated to try. It is all voluntary in the sense that Congress, by not appropriating money, can make this whole thing academic. It is voluntary in the Congressional sense.

[15] But there is another difference that I want to mention to Your Honor. Those 500 units under the first order reduced, if they were successful in putting them out there, reduced the number that had to go in the city.

THE COURT: That is right, and I am sure that that would give comfort and joy to CHA, to dump as many as they could outside the city limits.

MR. POLIKOFF: I assume so.

Now, we have changed that in the proposed order, Your Honor. It no longer would reduce what goes in the city. The Plaintiffs' proposed order says that in addition to the required number in the city, the required number being whatever Congress appropriates funds and HUD allocates units for, they shall, in addition to that, make an additional application for additional units to go into the

urbanized area. That is an important change because, Your Honor, they aren't subject to the obligation to try to put units out there until units are made available by HUD for within the city. In other words, HUD's opening the pipeline for units to flow into the city is what triggers the CHA's obligation to try to get them into the suburbs as well.

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[49] MR. POLIKOFF: • • • My last point—I have taken care of three of the four points—the last point was the power of the Court. You know, we are asking you to cross local political boundary lines. Does the Court have the power to do that? And even if you do, is this a proper case in which to exercise that power?

In answer to those two questions—but let me clear away two possible misconceptions first about our proposed order. The purpose of the proposed order is to provide housing for city residents, for members of the Plaintiff class as a necessary part of the relief that they are entitled to. The purpose is not to provide housing for suburbanites. It is not to provide housing out there in suburbia just because it might be nice to do it. It is to provided housing for the Plaintiff class, to provide housing for them out there because it is necessary to provide it out there to be effective inside the city.

[50] It is true under the proposed order 50 per cent of the units will be available to local residents, and they will be suburbanites, and they are not members of the Plaintiff class, but under the existing order—

THE COURT: And you, I guess, are pretty sure that there won't be any rush of those suburbanites to get into those housing complexes.

MR. POLIKOFF: I anticipate a rush, Your Honor, quite to the contrary. You know from the statistics you have previously been seeing that most of the poor in this metropolitan area are white and not black. In fact, as one of the exhibits will show, Your Honor, of the 12—I think it is an even dozen public housing projects in the Chicago urbanized area today, 11 of them, 11 of them are in what we would call the limited public housing area

in Chicago. The twelfth one, which is in a white area, has a fair percentage of white residents.

As Your Honor said in 1969, the whites have been denied access to public housing just as much as the blacks, and if housing is provided in a rational way in the suburban areas, I think those other 50 per cent of the units would be filled.

The purpose of providing that 50 [51] per cent is exactly the same as the purpose of providing the 50 per cent on the inside Chicago order, namely, to provide for integrated projects and community acceptability. There, too, you provided that 50 per cent of the units could go to people who are not members of the Plaintiff class. So that is one possible misunderstanding I wanted to clear up. We are not talking about putting housing out there because it is a nice idea, because some planner says so, we are talking about it because it is necessary to preserve the effectiveness of your order in the city.

The second possible misconception is that the Plaintiffs' order would impose requirements on and in effect enter orders against municipalities and housing authorities that are not parties to this case and have not themselves been found guilty of any discrimination of wrongdoing, and that is a misconception. That is not so. Why isn't it so? First, it is not so because the proposed order does not make any finding with respect to those entities and does not order them to do anything. That is down the road. This present order—

THE COURT: That is down the road until you run into a roadblock, then you come in and set aside [52] this and set aside that, none of which was adopted to bring about the keeping of blacks out or keeping low income housing out.

MR. POLIKOFF: What you have said is correct and I agree with it, and it is also true, and Your Honor knows it to be true, I believe, because we have argued this in connection with the City Council veto power, there isn't any requirement that those provisions had to have been adopted in order to discriminate or to keep blacks out. The only requirement is that Your Honor decide on the basis of evidence that it is necessary to set

those two provisions aside. It is not this and that and something else, it is only two provisions, to set those aside in order to provide relief.

Let me give you an example: In one of the cases that we relied upon and, indeed, that you nave cited, we supplied the citation, it appears in the order of April 10th, what is at issue in connection with a faculty desegregation case is a state law that gives teachers certain tenure rights, certain rights not to be assigned to other schools against their will. The Federal District Court orders desegregation of the faculty. The school board comes rushing in and says, "Look, we can't [53] desegregate the faculty by reassigning these teachers. They have these rights under state law," and now I am addressing myself precisely to your point, those state laws were not passed to discriminate. They were not passed to prevent desegregation of faculties, they were passed with valid and benign state interest in mind, so you can't monkey with them. And the Court said in that case, and in a whole slew of cases like it involving similar situations, that does not matter, state policy, benign, non-discriminatory state policy must give way when giving way is necessary to vindicate federal constitutional rights. The courts have said that again and again and again.

The state law that you set aside on April 10th of this year was not passed—there was no evidence that that law was passed to discriminate against blacks.

THE COURT: But there was some evidence that it was used to bring about segregation. I have no knowledge of any laws that have been passed or used to bring about segregation or prevent integration.

MR. POLIKOFF: There was no evidence that the law was used in a racial, subjective motivation, discriminatory sense.

[54] The COURT: Do you mean the City Council didn't use it in that sense?

MR. POLIKOFF: We introduced no evidence and neither did anybody else introduce any evidence—in fact, I made a point, Your Honor, in the argument, we were not accusing the City Council—

THE COURT: Way back at the inception, prior to my first opinion, there was such evidence from the mouths of CHA employees, which was cited in the opinion.

MR. POLIKOFF: The evidence was, and I think what you are referring to was, the evidence was that when CHA tried to go into white neighborhoods they were prevented from doing so because the City Council wouldn't approve sites in white neighborhoods. There was no evidence that the reason the City Council was doing this was that the City Council didn't like blacks. It might just as well have been that they didn't do it because they thought it might affect property values, or for any other benign reason.

THE COURT: What are we talking about, black, or low income housing or both? I think we ought to try and—

MR. POLIKOFF: We are talking about access by [55] blacks to low income housing.

THE COURT: All right, that is your definition.

MR. POLIKOFF: At least that is my understanding.

THE COURT: All right.

MR. POLIKOFF: I will be happy to discuss that further.

And I think that the issue that we are now talking about, which is central, Your Honor, is that in your decision in 1969 you made no finding about the subjective motivation of the City Council. You did make a finding that the effect of what the City Council was doing was to prevent low income housing from being built in white neighborhoods, and those are two very different things.

We had nobody on the stand, including CHA people, testifying about what was going through an alderman's mind, why he was casting his vote. We did have—

THE COURT: There is such a thing as I referred to once before, circumstantial evidence.

MR. POLIKOFF: Okay, all right, and if we are relying on the circumstantial evidence of the effect of what is being done, you will see, Your Honor, that the effect of the two laws we are talking about [56] is to perpetuate the identical racial discriminatory pattern in the urbanized area. Eleven out of twelve of these projects, you will

see from the evidence, are in black neighborhoods, more than 80 per cent black.

You will see that the tenancy of the projects is all black. The pattern is a smaller pattern, we don't have as many housing units, virtually duplicates the pattern you found in the city to justify your order. But the legal principle is what I want to remind Your Honor of, if the legal principle is that you do not have to find, and in these cases for example the tenure case that I referred to, the Courts have not found that laws were passed or used with a subjective racially discriminatory intent. They have found that the effect of the operation of the law has been to prevent the Court from remedying segregation, and for that purpose have set the law aside.

You will find on the basis of the evidence that the effect of the two laws we are talking about has been and will continue to be to prevent the use of the urbanized area to remedy the wrongs done to the Plaintiffs. There is no reason why that urbanized area shouldn't be used for a [57] remedy. HUD defines that as the housing market area. That area is an area which is a part of the State of Illinois. The housing authorities that operate within that area are not agents of the respective cities, as I pointed out, they are agents of the state.

If this is a rational and necessary course for remedy, and that is what we have got to prove, we will have a witness who will tell you that, in his opinion, you can accept the opinion or reject it, but I think you will accept it because I believe it to be your own opinion, you have said as much in your 1969 opinion, this is what is happening to the City of Chicago. Now, if that is happening to the city and if the way to stop that from happening is to use HUD's housing market area, or if that is a rational way to try, and if you can't use the housing marketing area because these two laws stand in the way, then you have the authority to set those laws aside for that purpose without any finding that the laws were passed or are being used for a subjective racially discriminatory purpose. You need only find that they are having the effect of preventing effective relief.

Let me come back and wind up before [58] this succinct opening statement gets unsuccinct.

THE COURT: Well, it has been my fault that it has not been succinct. I didn't let you make it succinct.

MR. POLIKOFF: I guess I have already made the point, but I want to emphasize it before I go on to the summary here, that this proposed order relieves CHA of no obligations in the city. CHA, on the contrary, under the order, has an additional obligation; indeed, its suburban activities only get triggered by allocation of city units. If they get no more units for the city, they don't have to do anything in the suburbs. If they get some more units for the city and are obligated to go forward with those, then they have to try in the suburbs as well. In that sense it strengthens Your Honor's order of 1969, as I pointed out before. They can't use suburban cities to reduce the inner city obligation. It is the reverse. The inner city, when it gets some housing units, obligates CHA to try to simultaneously put units in the suburbs. Indeed, CHA's position—this is why I don't understand why they don't love me the more, as Your Honor said earlier—their position has been from the beginning that to be effective in the city they [59] have got to be able to simultaneously proceed in the suburbs. This proposed order—

THE COURT: And they have had an opportunity to do so for some three and a half years.

MR. POLIKOFF: But these laws frustrated them. That is why we—

THE COURT: Let's get specific in regard to what laws you are talking about.

MR. POLIKOFF: Two laws, two laws; one law says that they can't go out into the county without the agreement of the county housing authorities out there. They can go out with the agreement but not without. The law I am referring to is Section 27(c) of Chapter 67½, Smith Hurd Annotated. The setting aside of that law would let CHA go out without the agreement of the housing authority. That is the first law.

The second law—

THE COURT: In view of their industry for the last three and a half years, you think I should put all my faith in the efforts of CHA? That would give them an

opportunity to build less in Chicago than they are obligated to already.

MR. POLIKOFF: It would not give them an opportunity, though, that is the very point, Your Honor. It does not relieve them of any inner city [60] obligations. They could put as many units out in the suburbs as they want under this proposed order and it wouldn't relieve them of an obligation with respect to a single unit in the city.

THE COURT: Well, they have been under a three and a half year obligation that they haven't performed in regard to.

MR. POLIKOFF: Well, they are continuing to be under that obligation.

THE COURT: I understand, but meanwhile the suburbs will blossom and they are just under an obligation.

MR. POLIKOFF: That can't happen. The suburbs can't blossom with public housing under this proposed order, because as I have said, the order—let me put it to you this way: You have got two roads, one leading to housing in the City and the other leading to housing in the suburbs. You can't move on the road that leads to housing in the suburbs until pro tanto you move on housing in the city. If they take two steps toward housing in the city, they are then permitted and obligated to take one step in the suburbs. If they never get to take that first step in the city, if the housing—if after the fifth—let me put it [61] this way in arithmetic: They have now got an obligation to go forward with 1,500 units in the city. Our proposal is that they be obligated therefor to proceed with 750, and that is all we are talking about 750 in the suburbs.

THE COURT: That is an escape hatch right there.

MR. POLIKOFF: Why?

THE COURT: Well, the 1,500 that they were supposed to go ahead with in the city, they already had 1,500 in the bank that we let them build, and this has just offset the 1,500 that they have in the bank. There was 1,500 out on the south side there—

MR. POLIKOFF: Right.

THE COURT: —that the CHA said, "Should we start building these 1,500?" And we said, "No, if you want to go ahead and build them, here is another 1,500 that we

draw against the 1,500 that you have got in the bank. Now you are expanding it to another 750 against the 1,500 that they haven't even succeeded in matching.

MR. POLIKOFF: Your Honor has a misconception.

THE COURT: I do?

MR. POLIKOFF: I am sorry to say that, but facts are facts.

[62] THE COURT: Maybe I do. I can't remember when this case was not on my call.

MR. POLIKOFF: Okay.

THE COURT: And I can't remember when I started entering orders. I can't remember the number of hearings that we have had and what was said at all of them, and I have had other cases on my call in the last six years since this lawsuit was filed.

MR. POLIKOFF: Well, Your Honor has been most patient for a long and frustrating time, and I recognize that, and I hope you understand that it is no pleasure for me particularly to come before Your Honor and say that we need more. I wish we didn't need more also, but I am calling them as I see them and I make—

[63] THE COURT: There is no question about your sincerity, Mr. Polikoff. That will never be questioned by me.

MR. POLIKOFF: I can give you no assurance that what we are talking about is going to work, just as you could give me no assurance that the orders you previously entered would work.

THE COURT: Didn't I give you some assurance?

MR. POLIKOFF: The reverse. You said you thought they wouldn't work.

THE COURT: This means there will not be any more public housing in Chicago, and there hasn't been. That is pretty good assurance.

MR. POLIKOFF: Right. That is a reverse assurance.

THE COURT: That is right.

MR. POLIKOFF: Let me also add to that, Your Honor—

THE COURT: My crystal ball is working better than yours.

MR. POLIKOFF: Let me add that if the sole effect has been to prevent—

THE COURT: As I predicted it would.

MR. POLIKOFF: As you predicted it would.

—A continuation of the pattern of [64] building public housing in Chicago in the black ghetto areas of the city, but that we couldn't get any housing built anywhere else, that, as a matter of judgment, your guess is as good as mine and so on, my personal judgment at least is that a continuation of that past policy was a negative and that if the order only has the effect of stopping a continuation of that past policy, that is a positive effect. It prevents a worsening of the situation.

THE COURT: And it did stop that.

MR. POLIKOFF: And it did.

Let me go back to what I think is a misconception. First of all, those 1,500 units in the bank were matched by 700, not the full 1,500. You said the first 700 had to go in white neighborhoods and that would take account of the 1,500. You gave them the other 750 units. Secondly, those 700 units are part of the 1,500 we are talking about, and they are now working on those 1,500. The lead time is great, but they have submitted proposals to HUD now and if the Court of Appeals affirms your order, they will start coming out of the pipeline. Miss Kula said the first units might well be occupied next May. I don't know how long it is going to take to get those 1,500, but they are started.

* * * *

[74] MR. POLIKOFF: * * * That is what we are talking about, "where necessary to vindicate federal constitutional rights," which is what we are asking you to vindicate by providing a necessary element for full relief, they may readily be bridged, namely, the political subdivisions. They are not sovereign entities.

I want to finally note how and why I think those principles apply in this case—six quick, quick reasons and then I will be done:

First, it applies because as I have already said I think the evidence will show that it is necessary that the relief you have ordered in the city needs the suburban element to make it effective.

Second, the area we are talking about [75] is a unity, an entity. It isn't something some urban planner dreamed up. It is something the United States Bureau of Census calls the housing entity, something HUD calls the housing market area. We aren't asking you to do any—

THE COURT: Does that make it sacrosanct?

MR. POLIKOFF: No, but it shows—it does not make it sacrosanct, but it shows that what we are asking you to deal with is something that the agencies who deal with housing view as an entity, not something Al Polikoff dreamed up.

THE COURT: No, I mean the Census Bureau, as I understand it, is supposed to count the people. I didn't know they had anything to do with creating areas.

MR. POLIKOFF: They do, Your Honor. In their census books they make judgments as to what are unified wholes from many points of view, transportation, jobs, et cetera, et cetera.

And HUD, more importantly than the Census Bureau, makes a judgment as to what is a unified whole for housing purposes.

Okay, we are talking about what those two governmental entities have said is a reasonable geographic area.

[76] Third, I have already mentioned that you are going to see that the racial segregation pattern in the city is duplicated in this area that we are talking about. That makes it appropriate to exercise the power you have in this case to bridge the boundary lines.

THE COURT: Not because of anything the suburbs have done up to this point.

MR. POLIKOFF: Because of the very same kind of facts that you were shown with respect to the City of Chicago, not racial motivation facts. We didn't prove that or try to prove it with respect to the City of Chicago, merely that the effect of the operation of this veto power that the suburbs are given has produced a certain result, namely, a segregated result.

When you found, Your Honor, that 99½ per cent, or whatever it was, of the housing projects in the city were located in black areas, you didn't find that was so because Alderman A was a racist and had cast his vote in

a particular way. What you did find was that the operation of that aldermanic system produced a certain result. You may then have speculated that the reason—you didn't explicitly say this in your opinion—you [77] may have speculated that the alderman was a racist. We didn't argue that. There might well have been other reasons why—you know, there is a lot of talk these days about class as distinguished from race, and people say that they don't mind, it is the poor people they don't want. Maybe that is what the aldermen had in mind. All I know is that the law is that when a specific defect is proven, and it is a racially discriminatory effect, that is enough, and that we will show in the suburbs as well as in the city.

The fourth of my six quick reasons—we are not talking about, as I already said, about something not contemplated by state law. It is contemplated by voluntary action. We only want to make it mandatory for purposes of relief, federal constitutional relief in this case.

Fifth, the evidence is going to say, Your Honor, that HUD has helped to create this pattern of the black city and the white suburb. It is appropriate therefore with respect to HUD that this order be entered and—

THE COURT: I will be interested in what your proof is in regard to that.

MR. POLIKOFF: Okay.

[78] And finally, Your Honor, the evidence will show that the jobs are moving out to the suburbs and that is another factor that you as a court of equity can and should take into account with respect to where the housing is to be provided for the Plaintiff class. Whatever may have been true back in 1969, you didn't have any evidence about jobs. If we had shown you then that for a reason like this, where the jobs are, or it doesn't make sense to locate the housing here anymore, Judge, you have got to locate it here, you would have listened to us. When we showed you that it didn't make sense to go above the third story, you included that provision in your remedial order. Equity, when it is going to grant a remedy, is going to grant a full and complete remedy. It is going to look at all of the relevant factors. It is not going to put blinders on. And just as the high-rise, which was

not an element of the case, we didn't offer any evidence about high-rises, so the jobs here are a factor that you can take into account.

Well, I have about finished. I thank you both for your interruptions and for your indulgence. I have said four things, I have said [79] first that the issue before you is whether an additional order is necessary to provide the Plaintiff class with full and effective relief, and if so whether it should be our kind of specific order or HUD's best effort order.

Secondly, I have said that I think the evidence is going to show that a further order of our sort is necessary and appropriate. It is necessary because not only do we need to expand the total quantity of relief, but more importantly, we have got to preserve the effectiveness of what happens in the city, always remembering that it is for the Plaintiff class we are talking about.

Third, I have said that I think under the law Your Honor has a duty to consider these things, to use all available alternatives and possibilities to effect the greatest possible degree of desegration. And, fourth, I think that if Your Honor is persuaded by the evidence of the necessity of doing so, it is clear that you have the power to cross the political boundary lines, which are not sovereignties.

Thank you, Your Honor.

THE COURT: We will take a five minute recess before we hear any evidence.

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[81] PHILIP M. HAUSER,

called as a witness or behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POLIKOFF:

Q Will you state your name, please?

A Philip M. Hauser.

MR. POLIKOFF: Your Honor, in view of the fact that we have just agreed that the September 28th hearing may

be treated as part of the record of this proceeding, Professor Hauser, I am sure you will remember, was qualified at that time and I won't repeat those questions.

THE COURT: All right.

BY MR. POLIKOFF:

Q Professor Hauser, have you computed from census information any population figures for the black and white populations of Chicago and for [82] other cities for decennial censuses since 1900 at my request?

A I have, but if I may defer the answer to your question, with the Court's permission, I should like to correct an error in my previous testimony when I last appeared in this Court as a witness.

You may recall when I was asked by defense counsel whether I was a member of the—what is it?

Q The American Civil Liberties Union?

A The American Civil Liberties Union, and my answer was in the negative. When I recounted my day's experience to my wife that evening she told me that she had at some time in the past sent a membership in in my name so that I was a member without my knowledge. My wife has that authority in my household.

THE COURT: What is new, Professor?

BY THE WITNESS:

A (Continuing) In any case, had I known I had been a member I would not have denied it. I have no reason to. I don't think it is a subversive or dangerous organization.

Now, with respect to your question—

[83] BY MR. POLIKOFF:

Q Yes?

A Yes, I have made such calculations.

Q Would you tell me what cities you have computed that data for and state briefly what the data shows?

A Yes, among others, Washington, D. C., Newark, New Jersey, Detroit, Michigan, and the City of Chicago.

What the data show, focusing only on the central cities, is in 1900 for example—

THE COURT: What is your definition of central city? You mean the city limits?

THE WITNESS: The city limits. And this is the terminology of the Bureau of the Census as reported in the statitics.

THE COURT: We do have another definition of central city which is where the housing currently is being proscribed.

THE WITNESS: Yes, inner city.

BY THE WITNESS:

A (Continuing) But this is the city used by the Bureau of the Census in their statistics for Standard metropolitan statistical areas and they [84] divide the metropolitan area in the central city and the ring. In some metropolitan areas—

Q That is the ring, r-i-n-g?

A R-i-n-g, the remainder of the metropolitan area.

And I might say in some metropolitan areas, what they call the central city is more than one city, it is the nucleaus for the metropolitan area.

Q Is that true for Chicago or not?

A Chicago is the only central city.

In the case of Washington, D. C., that area had a population 31 per cent Negro—

MR. MURRAY: Your Honor, for the record, we will object to the relevancy and the materiality of this line of questioning, and if we may have that as a standing objection during this whole line of questioning?

THE COURT: All right, and you are reserving your right to strike if it turns out that it is not relevant. I can't rule on it at this time until I hear the answer.

MR. MURRAY: Exactly, Your Honor.

THE COURT: You are reserving your right [85] to strike if it turns out not to be relevant.

BY THE WITNESS:

A (Continuing) In 1900, Washington, D. C., 31 per cent blacks; it was 35 per cent by 1950, and according

to the return of the nineteenth decennial census, that is as of April 1, 1970, it was 71.1 per cent black.

In the case of Newark, 2.7 per cent black in 1900, 17.1 per cent black in 1950, 54.2 per cent black in 1970.

In the case of Detroit, 1.4 per cent black in 1900, 16.2 per cent black in 1950, 43.7 per cen black in 1970.

Chicago was 1.8 per cent black in 1900, 13.6 per cent black in 1950, 32.7 per cent black in 1970.

And I have the data here for the intermediate years.

BY MR. POLIKOFF:

Q Professor, have you extrapolated those percentages for Chicago for the 27 odd years remaining in this century?

A I have.

Q Could you give those figures to me and [86] tell me the basis for your extrapolation?

A Well, if one assumes that the changes in black and white population respectively during the intercennial decade of the '60's were to continue—

Q That means from 1960 to 1970.

A 1970. If this were to continue to be the case, those same changes, then by 1980 Chicago would be 45 per cent black, by 1990, 58 per cent black, and by the end of the century, and that is just about one human generation away, 70 per cent black. Actually if we look at some critical breaking points with present trends, unless they are interrupted, Chicago would be over 50 per cent black by 1984, and interestingly enough, Your Honor, this jibes with the Kerner Commission Report which was calculated, the figure was calculated before the 1970 census results were available, but it comes out precisely the same year. Chicago, with present trends if not interrupted, would be over two-thirds—it would be two-thirds black by 1997 and 75 per cent black by 2005.

Q Now, Professor, can you say anything about the relationship between these general population figures you have just been giving and the projections [87] and figures as to school populations?

A Well, these figures relate, of course, to the total population. If one were to look at school enrollment figures, then it turns out that the proportion of black for the school population is much greater than the proportion of black of the total population for two reasons; one is that the black population is a much younger population than the white population by reason of a higher birth rate, and the second is that white students have found escape hatches, of course, in the private and parochial schools.

Now, only yesterday the Chicago Board of Education reported its census results which indicates, for example, that at the present time over 56 per cent of the public school population is black, although only a third of the total population is black.

Q Professor, have you made any computation at my request respecting census tracts in the city rather than population trends and projections?

A Yes, I have.

Q Would you tell me what that is?

A Well, if one looks at the proportion of [88] census tracts in the City of Chicago which had 30 per cent or more black, then these are the numbers that result and that come out in a projection; as of 1960, 23.1 per cent of all the sum, over 900 census tracts in the City of Chicago, had 30 per cent or more black population.

THE COURT: That is what per cent?

THE WITNESS: 23.1 per cent in 1960.

BY THE WITNESS:

A (Continuing) In 1970, 34 per cent of the census tracts of Chicago had 30 per cent or more blacks, and I might say—

Q And—go ahead.

A I might say I have used the census tracts in this way because it would be an approximation of the land area which is black, actually an understatement, because the way the census tracts are designated or designed by the census bureau, they are based on density population, and since the inner city populations are much more dense, they tend to have lesser land area than the average tract.

Now, the projections indicate that by the year 1990, with present trends, it is [89] possible that 74 per cent

of the census tracts in Chicago would have 30 per cent or more blacks, and by well before 2000 every census tract in the City of Chicago would have at least 30 per cent blacks.

Q And in making these computations you have taken no account of the so-called buffer zone in the existing order, is that correct?

A That is quite correct. This refers to the entire city.

Q Turning back to the population figures for the City of Chicago, Professor Hauser, what changes in the white and in the black population of the city took place in the ten years 1960 to 1970?

A Well, between 1960 and 1970 the population of the city declined by 183,447 persons, according to the census returns. Now, that decline of over 183,000 persons was made up of a decrease of 504,981 white persons, offset by an increase of 321,534 black persons, and these figures do not tell the total story because the decrease of over half a million white people in the ten years between 1960 and 1970 was compounded of an out migration of whites, more than half a million, offset in part [90] by the natural increases of whites, that is the excess of births over deaths; so that it is clear that well over a half a million people left the City of Chicago during the decade.

Q Can you say anything, Professor, about the composition of the black and white population of Chicago with respect to the prevalence of poverty?

A Yes, the census results have information about those in poverty.

Q Tell us how you define poverty for this purpose?

A Well, poverty is defined on a rather complex sliding scale. In general, a family is held to be poor—and this is by definition of federal agencies—if a family of four has an income of less than approximately $3,200. Now, that income goes up and down, the level, with the size of the family. According to that federal definition, 20.7 per cent of all Negro families in Chicago as of 1970 were in poverty, whereas the percentage for whites was less than ten per cent. There is a ratio of twice as large a proportion of black families are in poverty in Chicago as the [91] white families.

Q Professor, talking about the racial residential pattern in the City of Chicago, do you have an opinion now as to what these figures you have been giving us mean with respect to Chicago, for, let us say, the remaining 27 years of this century?

A Well, I think the conclusion is inevitable. We already have, to a considerable extent, an apartheid society in which blacks and whites in the City of Chicago are separated in space and unequal.

With present trends, unless there is intervention or interruption, it is clear that from now on we will become increasingly and more so an apartheid society with both physical separation between blacks and white and the inequalities that are prevalent and exist in part by reason of the separation.

Q Professor, if low income housing, particularly low income housing was available to Chicago residents, including black Chicago residents, were made available in the urbanized area surrounding Chicago on a scattered basis, scattered site basis, what would, in your opinion, the effect of such [92] housing be on the pattern of population movements, particularly white population movements you have testified to?

A Well, in my judgment, anything that in effect subjected the surrounding areas, the suburban areas in the Chicago region, to precisely the same types of requirements that exist within the City of Chicago, or to put it more succinctly, anything that would change the suburb from being escape hatches would automatically tend, in my judgment, to diminish the rate at which there is a white exodus from the city while simultaneously providing some options for blacks to live either within the city or within the suburban area.

In addition, I think there would be what might be thought of as either a leverage effect or a multiplier effect; if it became clear to the white person in the City of Chicago that anywhere he moved within the urbanized area or within what HUD defines as the housing market area, which is the standard metropolitan statistical area as defined by the Bureau of the Budget and Management, the same area, six county area, that if it became clear

that public housing for the poor, including [93] blacks, were to be placed in any part of the urbanized area, then I think the perception of the white population would be such as to produce the effect of saying there were no escape hatches and there is no place to flee. I think this would be the effect.

Now, this is not to say that this would be the effect of only what is being proposed here, but this, what is being proposed, is a step in that direction.

Q And have you read the order that is being proposed in this case by the Plaintiffs?

A Yes, I have.

Q Can you say anything specifically about whether in your opinion that order does or does not rationally conduce to the objectives that you have just stated?

A Well, in my judgment it very definitely does and it does so out of several, I think, very important considerations.

Q What are they?

A Namely, that for one thing, by concentrating on the urbanized area of Chicago, which has definitely delineated boundaries by the Bureau of the Census, you would be in effect focusing on the [94] area outside the City of Chicago into which the predominant overwhelming proportion of whites do move when they leave the City of Chicago. In that sense it is a realistic area.

Secondly, the principles you have embodied in the proposed order involved scatteration, a distribution of proposed housing sites throughout the urbanized area so as to minimize a repetition of the segregation which has occurred and still characterizes the City of Chicago.

And, third, the provisions in the order, which perhaps might be called a mini-ghetto provision, and which provide units to prevent concentration of units in black suburban areas also assures the inability of large ghetto areas to form within the suburban communities.

In other words, it seems to me that your order—

THE COURT: You are aware that there are some ghetto areas in the suburbs?

THE WITNESS: Oh, very definitely. In fact, most of the black population which lives in suburban Chicago

is already heavily concentrated in ghettoized communities, but [95] the effect of this order unquestionably would be to prevent the formation of ghettos and to assure dispersion to the extent that this order can operate in that direction.

BY MR. POLIKOFF:

Q You have made computations, as your testimony indicates, from the census data; in making those computations, did you prepare notes and have you brought those notes with you here today?

A Yes, I have, and I might point out apropos of this question, too, that remember that in 1970, and although a third of the population of the city was black, that was true of only about 17 per cent of the metropolitan area.

Q You have your notes with you here today?

A I do.

MR. POLIKOFF: I have no further questions, Your Honor.

CROSS EXAMINATION

BY MR. MURRAY:

Q Professor, do you recall your testimony that you gave on September 28th?

A Well, I think so. I don't know in what detail.

[96] Q Let me refresh you then.

Do you recall making the statement, "Chicago is the most segregated of any of the large northern cities of the United States"?

A I do.

Q Do you know if that type of statement, with respect to your expertise, is considered good form, shall we say?

A Well, there it is a question of what is considered good form. The point is that by utilizing a given segregation index and one which we—

Q Yes or no?

THE COURT: I dont' know that you can limit it to a yes or no.

BY THE WITNESS:

A Well, I would answer yes and no.

BY MR. MURRAY:

Q All right.

THE COURT: Will that create utter chaos out of mere confusion?

BY MR. MURRAY:

Q Well, then, do you agree with the statement, and you did provide this book for my examination, "Negroes in Cities, Residential Segregation, [97] Neighborhood Change by Charles E. Taeuber and Alan F. Taeuber"—is that how you pronounce the name?

A The first name is Karl.

Q Karl?

A And the pronunciation is Taeuber.

Q And you did provide that for my examination, is that correct?

THE REPORTER: Would you spell that name, please?

THE WITNESS: Pardon me, I am asked to spell the name. T-a-e-u-b-e-r, and Karl with a capital K.

BY MR. MURRAY:

Q Do you recall that?

A Yes, yes.

Q And do you agree with the statement appearing on Page 36 of that book, "It is possible"—I think it is in the middle of the paragraph—"It is possible to search through the index values for individual cities," and it refers to table 1"—for evidence to add to the propaganda game sometimes played by civil rights advocates that 'City X is the most segregated in the country' although the 207 cities can be ranked from low to high on the [98] particular scale. I think we wish to discourage such usage."

Do you agree with that statement?

A Yes and no. And let me indicate the qualifications; these people who are the authors of this book, by the way, happen to be my students and I am not always successful in teaching them the things they should know.

Q Then you disagree with that statement?

A No, because I think that if one were to explicitly attempt to rank these cities with say one or two per-

centage point differences on this particular index and other segregation indexes can be used, that one can push it too far, and I agree with the statement to the extent that I would say some propagandists have pushed these things to a point where they have no statistical significance.

When I talk about a difference of a segregation index of over 90 for Chicago and 78 for New York City, this is a difference which has, I think, a very real meaning, and to that extent therefore, if you want to interpret it that way, I would be disagreeing with the statement.

In other words, what I am saying is [99] the old dictum of Aristotle still holds, "Accuracy is always relative to the use thereof." And the fact that others misuse it does not necessarily undermine my use of it in my testimony.

Q Well, could you just explain, just to keep everybody—what is the basic theory from a demographic point of view of the segregation index? What is the theory it is premised on?

A Well, there isn't very much theory. It is an operational device. What the segregation index employed here means is simply this, if you ask the question what proportion of any population, let's be specific, what proportion of the black population in the City of Chicago would have to be moved if they were to approximate or equal the distribution of the white population by whatever area units you use, city blocks or census tracts or community areas, then an index of 91 per cent means that it would be necessary for 91 per cent of the blacks to be moved to achieve the same distribution as that which the whites have. This presumably would be complete desegregation.

Q And which would have a value of zero on the segregation index, is that correct?

[100] A That is right.

Q With respect to the segregation index which you indicated was 90 per cent, more than 90 per cent, do you have a precise figure on that? I believe that you have it in your notes there.

A Yes, I had it calculated for 1970 on the basis of census tracts for which the data were available to me at the time.

I might say that it is not directly comparable to the indexes which are in the Taeuber book which were based on city blocks, information which was not then available. And I have got it—I will have to look for this piece of paper.

May I say that by doing it on census tracts instead of city blocks I have tended to understate the index. It would rise if the area is smaller. The smaller the area the greater is possible the dispersion and the higher would the index become, but for 1970 my calculations gave a white versus Negro segregation index of 91.

Q And did you compute the segregation index for the City of New York or did you take that from the Taeuber book?

A This is taken from the Taeuber book. [101] I have not computed it for 1970.

Q For 1970, is that correct?

A Yes, but the—

Q And that figure is based upon the available 1960 census data, is that correct?

A That is correct.

Q And as far as the Taeuber book—and I would like you to turn to Page 32 and 33 of that book which has the tables, I believe, that you took that figure from New York, New York.

A Yes.

Q Do you have that there, Professor?

A New York City, yes.

Q All right, is it not a fact that the segregation index for Cleveland, Ohio is 91.3?

A Cleveland, Ohio? Yes.

Q Is it not a fact that the segregation index for St. Louis, Missouri, is 90.5?

A St. Louis, yes, 90.5.

Q Is it not a fact that the segregation index for Wichita, Kansas is 91.8?

A Yes.

Q And is it not a fact that the segregation index for Warren, Ohio, is 90.4?

[102] A Warren, Ohio? Yes, 90.4.

Q And Joliet, Illinois, is not the segregation index 90.2?

A You are straining my acquaintance with the alphabet.

Yes, 90.2.

THE COURT: Joliet, is that in the suburban metropolitan area that we are talking about?

MR. MURRAY: That is in the standard metropolitan statistical area, Your Honor. That is in Will County.

THE COURT: And we are talking about the metropolitan area into which they seek to spread.

MR. MURRAY: No, it is not. It is in Will County.

THE WITNESS: It is in Will County.

BY MR. MURRAY:

Q Professor, how many blacks presently live in the City of Chicago?

A Well, I can't answer that question precisely, but I can tell you what the census reported in 1970.

[103] Q That is all I am asking you.

A Yes, okay, and the answer to that question is 1,102,620 plus, if I—I am afraid I must say at least ten per cent who were undercounted, at least ten per cent.

Q Well, approximately what number or percentage of blacks would be eligible for public housing, using your previous testimony as to what you define as a poverty level income?

A Well, I can't—

MR. POLIKOFF: Just a moment. Without objecting to the question, I want to make it clear to Your Honor that the poverty level and the eligibility for public housing level are not the same. As Mr. Murray knows, the eligibility for public housing is at a higher income level than the poverty level, so that the response to this question does not, as would otherwise appear, give the number of eligibles for public housing. It would be larger than the responsive answer would indicate.

THE COURT: All right.

[104] BY THE WITNESS:

A The answer is—there is an answer to your question, but it would involve consulting a census volume on the one hand and the CHA requirements on the other, and I don't have that information before me.

BY MR. MURRAY:

Q Mr. Polikoff did not request you to prepare some compilations on that?

A No, he had not.

Q You heard Mr. Polikoff's opening statement, did you not?

A I did.

Q And you heard Mr. Polikoff's remarks referring in his opening statement to the spreading black tide; do you know what he was referring to?

A Oh, I think he was using somewhat poetic language which startled me a little bit. I don't often hear it in the courtroom. The fact that the black population was increasing and actually acquiring larger and larger proportions of the space in the City of Chicago, which is of course true.

Q And you have already testified that you [105] are familiar with the Plaintiffs' proposed low income housing distribution plan, is that correct?

A Yes, I have read the proposed order.

Q Did you assist in this preparation?

A Indirectly. I was asked to—my judgment about cutting points, this, that and the other, so I guess the answer is yes, so I had a very minor role in it.

Q When were you consulted?

A Oh, I just came back from Asia about two weeks ago and it must have been before I left for Asia, and I would judge that as probably two months or three months ago.

Q All right, thank you.

Now I am going to ask you to assume several factors that you have previously testified to and then ask your opinion as an urban expert for the following: Assuming Plaintiffs' proposed judgment order is entered, assuming that CHA finds suburban sites for low income housing, assume that the statutory constraints to the location of

such housing are either overriden by Court order or the communities voluntarily accept said housing units, assume further that the Chicago area office of HUD [106] provides funding approval for the 20,000 units of public housing to carry out Plaintiffs' plan each year for the remainder of this century, would this halt or materially abate the spreading of the black tide?

A Well, to begin with you have got a lot of assumptions there, but—

Q I just asked you to assume that those assumptions were correct.

A Sure. And the answer would be that this order alone, in my judgment, could not begin to do that. It would constitute one step in the direction that, in my judgment, would be desirable public policy, assuming that it is the policy of the United States not to, shall I say, support the apartheid society and to make some effort to provide people with equal opportunity despite racial or income differences.

Q So your answer would be no?

A My answer is not no. It is the first step. It is a step in that direction. By itself it certainly cannot.

Q Would your answer be different if HUD were able to fund, let's say, 50,000 dwelling units [107] a year under this proposed judgment order, assuming the funds were available?

A My answer is probably not, although with that larger appropriation there is no doubt in my mind that a good part of the relief to which this suit is addressing itself would be effected, that is, there would be much more relief in the sense that the Plaintiff class would have options for housing other than in the ghetto of the City of Chicago, and the more housing units there are in accordance with this proposed order, the more likely is that to be the case.

Q Are you familiar with this—let the record reflect I am holding up a United States Department of Commerce publication No. HC(3)-68 United States Department of Commerce Bureau of the Census entitled "Black Statistics, Chicago, Illinois, Northwestern Indiana Urbanized Area 19th Census of Housing".

Are you familiar with this volume?

A I have seen it. I am not very familiar with it. I have been spending a lot of time in Asia.

MR. MURRAY: I would like to have this [108] marked as HUD's Exhibit B for identification as of this date.

(Said exhibit marked HUD Exhibit No. B for identification as of November 27, 1972.)

BY MR. MURRAY:

Q Mr. Hauser, I show you HUD Exhibit B for identification and I ask you to turn to the page in the volume that I provide you there and ask you, is that a Xerox copy of that particular table?

A Oh, I have seen this table before and I am sure it is a Xerox copy.

Q All right, I just wanted to make sure you can authenticate that.

A Yes.

Q And in your opinion this order is a fair share order, is that correct?

A No, it is not. I don't think it is a fair share order at all.

THE COURT: Which order now are we talking about?

MR. MURRAY: The proposed judgment order. When I refer to the preferred order I am referring to the proposed judgment order.

[109] THE COURT: I just want to be sure.

BY THE WITNESS:

A Not at all. It seems to me on the contrary, this represents a kind of an abandonment at least pro tem of the fair share principle. It is simply an order designed to take an initial step to provide scatterage, to prevent ghettoization and to increase the options of black communities for residents in other than the inner city ghettos of the City of Chicago and to provide the relief which occasioned this case in the first instance.

Q So in your opinion this is not a fair share order, is that correct?

A Not at all.

A fair share order, in my judgment, would go far beyond anything that is proposed in this order.

Q And is it not a fact, referring to HUD's Exhibit B for identification, that that lists all the places where you have a population of 2,500 inhabitants or more in the Chicago urbanized area? Is that correct?

A Yes, yes, I am sorry I did not realize that that was a question.

[110] Q And that is approximately about 160, I believe, 170 communities, is that correct, excluding the unincorporated areas?

A Yes, approximately.

Q And the data contained in there deals with total population and the housing units that are located in those particular areas.

A Yes. I am familiar with this.

I might add, incidentally, when you asked about familiarity, I was chairman of the advisory committee that planned this census, so I have some general familiarity with all aspects of it.

Q All right.

So with respect to dispersal—the order calls for 700—I believe 750 units of housing is that correct?

A Yes, in the urbanized area, right.

Q And that would average out, if we were to disperse it on a quota "fair share" basis for two units per suburban municipality, is that not correct?

MR. POLIKOFF: Your Honor, if I may, this phrase "fair share" that is being used by Mr. [111] Murray pretty regularly now, it is—

THE COURT: You have used it on prior occasions and in your briefs.

MR. POLIFOFF: We have not used it in this hearing and we have not deliberately used it because as indicated ours is not a fair share plan. All I am suggesting now is that the testimony is going to be—

THE COURT: I think that is firmly established, uncontradicted and undenied at this time.

MR. POLIKOFF: Right, but I want to know what Mr. Murray means when he uses the words "fair share" directing the questions to Mr. Hauser so that the record will be clear as to what he is talking about when he answers.

THE COURT: When you use "fair share", Mr. Murray, do you mean fair share as has heretofore been used in this Court room?

MR. MURRAY: Yes, Your Honor, that is what I was always under the assumption that that is what the Plaintiffs have consistently talked about.

[112] THE COURT: I know it is not a term that is strange to my ears.

BY MR. MURRAY:

Q Is it not correct, Professor, that the dispersal of those 750 units would come out to about two units per suburban area? Is that correct?

A This arithmetic is approximately correct.

Q Professor, you said that this order, in your opinion, is not a fair share order, and yet you based, as I understand your testimony, as the reasons why, in your opinion, this is a good order, that it would close up all the escape hatches, is that not correct? Is that not part of your opinion?

A No, what you have stated is not correct. It is not what I have stated.

What I have stated is that it would not close up all escape hatches, but I said anything operating in that direction would tend to have the effects to which I referred.

Now, it is patently absurd to talk about 750 units closing up all escape hatches.

Q I agree.

A But you have got to begin somewhere. The [113] point is that you have got to begin somewhere.

Q I agree.

Well, then, if this is not a fair share order, in your opinion, what kind of numbers of dwelling units for low income families would you envision in order to achieve, in your opinion, full relief for the Plaintiffs in this lawsuit?

A Well, in my opinion, in the longer run, I would hope that a fair share principle would be applied. The fair share principle—

Q One second, Professor.

MR. MURRAY: Would you please read my question to Professor Hauser? I think he misunderstood my question. Would you please read the question, Mr. Court Reporter?

(Question was read.)

BY THE WITNESS:

A Well, I can't give you a number out of my head, but I could calculate one.

Q Approximately.

A Well, put it this way, there are approximately 17 per cent of blacks in the metropolitan area of Chicago, the six county area; under a fair share order, and assuming complete voluntary, and [114] I think I stress voluntary efforts at integration, this would mean that something like 17 per cent of the population of all communities in the metropolitan area would be black. You can translate that into households and dwelling units if you wish, but you are restricting it to the poor.

Q Do you have a figure in mind, Professor, at all? Do you have any opinion?

A Well, if you want 17 per cent of a population of seven million, it would tell you how many people are involved, or if you want—and let me read the number of blacks that there are in the City of Chicago, or in the metropolitan area.

Q Could you do it quickly? I hate to ask you this. Can you give me a quick calculation as to just an approximate figure as to how many number of dwelling units for low income families, in your opinion, would envision in an order to achieve full relief? I have a pencil and a paper and I don't mean to—I would like to have that answer.

A In the City of Chicago, as I have already said, 20 per cent of the black families are poor. Now, let me work with that poor figure because I can tie it to that. This

is not the same as those [115] eligible for public housing, as you are aware. There is a numerical answer to your question and I don't have the data necessary to calculate it, but I can give you an approximation based on the poor. This means that there are 50,548 Negro families in Chicago as of April 1, 1970 living in poverty.

Now, of those families the total number in CHA is approximately what? I think one of the CHA people can tell me that better than I can dig a number out of my head. Subtract that and that tells you how many more would have to be done to house the poor.

What is the number of families in CHA projects now?

MISS KULA [CHA Attorney]: We have 40,000 units of public housing, but that includes some—that includes the elderly, so I think it is 35,000.

BY THE WITNESS:

A (Continuing) 35,000 units of public housing of which something like ninety some per cent are black, is that right?

MISS KULA: Yes, 95 per cent.

[116] BY THE WITNESS:

A (Continuing)—95 per cent are black, let's assume all 35,000 units. You have at this time some 51,000 black families who are poor, so there is a 15,000 gap between that number plus, of course, the additional who are eligible for public housing under their income regulations, which involves many more people than those who are just defined as poor in the census reports.

Now, that is as close as I can come at the moment.

BY MR. MURRAY:

Q Can you give me any sort of number? All I want is a number.

A Oh, yes, but this is an unreasonable request.

Q Okay.

A That is, I do know numbers pretty well—

THE COURT: Mr. Murray, how much longer are you going to be? I have got a jury with a verdict.

I mean, do you want some more time tomorrow morning or what? I am trying to get the Professor out today if I can.

[117] THE WITNESS: I have to teach tomorrow morning.

MR. MURRAY: I am finished, Your Honor.

THE COURT: Do you have something, Mr. O'Brien?

MR. O'BRIEN: Judge, I have a surprise. No questions.

THE COURT: Anything, Mr.—

MR. POLIKOFF: Just one question.

REDIRECT EXAMINATION

BY MR. POLIKOFF:

Q Mr. Murray's examination of you suggested that there was, I believe, one city that had a higher index as computed by the Taeuber book than the figure you had given for Chicago; do you have any explanation for that?

A Well, in my earlier testimony I said Chicago was the most segregated large northern city. Many of the cities to which Mr. Murray referred I would not regard as large.

If you take the cities of a million and over, why, the Chicago index is higher than those of any other city of a million or more in the north, so I don't consider that as being in [118] conflict with the testimony I presented.

MR. POLIKOFF: That is all, Your Honor.

THE COURT: I think, Professor, we will let you go and teach tomorrow morning.

THE WITNESS: Thank you, sir.

(Witness excused.)

• • • •

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PLAINTIFFS' EXHIBIT NO. 11

[Admitted November 28, 1972]

HOUSING AUTHORITIES AND PROJECTS IN THE CHICAGO URBANIZED AREA *

Housing Authority	Date of Incorporation	Project Designation	Project Location	Year Completed	Number of Family Dwelling Units	Racial Composition of Tenants as of 11/15/72			Racial Composition of Census Tract in Which Project is Located (Percent Non-White)	
						White	Black	Other	1960	1970**
COOK COUNTY Housing Authority County of Cook	1946	Ill. 25-1	16th and Arnold (Chicago Heights)	1953	15	—	15	—	70.8	87.6
		Ill. 25-2	11th and Fifth (Chicago Heights)	1953	37	—	37	—	70.8	87.6
		Ill. 25-3	75th and 63rd Pl. (Summit)	1953	35	—	35	—	30.0	33.1
		Ill. 25-4	139th and Grace (Robbins)	1956	100	—	96	—	93.9	94.4
		Ill. 25-5	11th and Wentworth (Chicago Heights)	1962	120	1	117	—	70.8	87.6
		Ill. 25-6	16th and Ellis (East Chicago Hgt's)	1960	100	—	99	1	61.7	79.5
		Ill. 25-7	11th and Berkeley (East Chicago Hgt's)	1963	116	—	110	5	61.7	79.5
		Ill. 25-10	16th and Greenwood (East Chicago Hgt's)	1971	100	—	99	—	—	79.5
		Ill. 25-12	135th and Woodlawn (Robbins)	1972	100	—	100	—	—	94.4
		Ill. 25-16	Various (Leased Housing) (Evanston)	1972	95	16	79	—	—	—

* Projects are all assisted by HUD under the provisions of the United States Housing Act.
** 1960 and 1970 Census Data.

HOUSING AUTHORITIES AND PROJECTS IN THE CHICAGO URBANIZED AREA (cont'd.)

Housing Authority	Date of Incorporation	Project Designation	Project Location	Year Completed	Number of Family Dwelling Units	Racial Composition of Tenants as of 11/15/72			Racial Composition of Census Tract in Which Project is Located (Percent Non-White)	
						White	Black	Other	1960	1970
DUPAGE COUNTY										
Dupage County Housing Authority	1941	No Projects	——	—	—	—	—	—	—	—
LAKE COUNTY										
Lake County Housing Authority	1946	Marion Jones Homes	Various (North Chicago)	1962	125	2	123	—	22.4	83.6
Waukegan Housing Authority	1951	Barwell Manor	Various	1965	120	1	118	1	55.1	26.9*
		Armory Terrace	2701-19 McAree Rd. (Waukegan)	1965	50	32	9	9	2.9	3.7
North Chicago Housing Authority	1969	No Projects	——	—	—	—	—	—	—	—

* The boundaries of this census tract were changed from 1960 to 1970. The 1970 census tract is immediately adjacent to a census tract which is 75% non-white.

NOTE ON ELIGIBILITY

Cook County Housing Authority Regulations state that all applicants, regardless of period of residence, shall be eligible for public housing, but that a preference in the selection of tenants may be granted based on a period of residency in the municipality in which the project is located, if reasonable as to time and if established by the local governing body of the municipality and approved by the Authority. Periods of residency established by the above municipalities for preference purposes are as follows:

1. Chicago Heights—2 years.
2. Robbins—2 years.
3. Summit—1 year.
4. East Chicago Heights—2 years.
5. Evanston—based on priority to applicants with longest period of residency.

Eligibility for Waukegan Housing Authority projects is conditioned upon 2 years residency in the City of Waukegan.

The Lake County Housing Authority provides that a preference in the selection of tenants is to be granted based on a two-year period of residency in the municipality in which the project is located. Eligibility for Lake County projects is conditioned on residency in the County.

PLAINTIFFS' EXHIBIT No. 18

[Admitted November 28, 1972]

CITY OF CHICAGO

OFFICE OF THE MAYOR

[Emblem]

May 12, 1971

Mr. George J. Vavoulis
Regional Administrator of
Department of Housing and
Urban Development
360 North Michigan Avenue
Chicago, Illinois 60601

Dear Mr. Vavoulis:

In accordance with the conferences held by representatives of our offices, this letter of intention is submitted delineating the proposed activities to be undertaken in the City of Chicago to accomplish the objectives of providing increased housing opportunities for all its citizens. Your acceptance of this letter, as well as the acceptance thereof by the Chicago Housing Authority (CHA), reflects the intention of your agencies to provide your full cooperation in the implementation of these programs.

The following is an outline of the proposed action program and a timetable for its accomplishment.

PART I. UNDERTAKINGS BY THE CITY AND THE CHA

The following actions are to be implemented within the times hereinafter set forth.

A.

DEMOLITION

The City will reduce projected demolition of housing units for the current Workable Program period from 12,827 units to 12,327 units and shall submit a report to HUD by June 15, 1971, identifying the sources and numbers of such reductions in demolition activities.

B.

DEVELOPMENT OF SECTION 235 HOUSING SITES

The City of Chicago and other local entities presently have title to approximately 1,000 scattered vacant lots situated within the boundaries of the City which will accommodate the development of single-family or townhouse units under the Section 235 housing program. Working with Model Cities' funds, the City will accomplish the following:

1. Develop programs for land cost write-down, downpayment loans or grants, and homemaking assistance.
2. Establish procedures and formalize agreements, satisfactory to HUD, to assure that not less than 250 of units of said Section 235 housing will be available for purchase of low-income families.
3. A delineation of the location of sites for 500 units of said Section 235 housing, including the 250 units which will be made available for purchase by low-income families, shall be submitted on or before June 15, 1971, to HUD together with a program and construction schedule. Invitations for bids for construction contracts for the 250 units for low-income families shall be announced by June 15, 1971, and contracts shall be executed by September 15, 1971, subject to HUD providing Section 235 allocations.
4. Said housing shall be available in accordance with the 1968 Civil Rights Act and the Open Housing Law of the City of Chicago. It is anticipated that the City and The Chicago Housing Authority will cooperate in this effort by making available to the developers of the units for low-income families, approximately 50-100 sites in census tracts in the City with a nonwhite population not in excess of thirty (30) percent.

C.

LEASING AND RENT CERTIFICATE PROGRAM

A new leasing and rent certificate program will be undertaken with up to one million dollars of Model Cities

money, or other Federal funds, and one million dollars of community improvement bond money to expand the leasing program for housing low-income families. Contracts will be entered into with major private real estate management firms to identify available units throughout the Chicago Metropolitan area and enter into leases for said units for up to 1,200 families. Families if they wish may receive a rent certificate for use with units they identify. Such rent certificates will be issued after a unit has been identified and provision has been made for occupancy thereof. The City's Relocation Division will identify families eligible for this program and make their names available to the Chicago Dwellings Association. The overall responsibility for implementing this program will rest with the Chicago Dwellings Association. The City will make funds available on a 50-50 matching basis, utilizing local money and Model Cities money, or other Federal funds, for this supplementary leasing program for a duration of five years, unless there is a determination of reduced need, concurred in by HUD, that permits a later reduction of the program.

This leasing and rent certificate program will be administered so that 200 rental units for low-income families will be identified (or rent certificates issued) and made available for occupancy by low income families by June 15, 1971; said leasing and rent certificate program to be continued thereafter at a rate of 200 rental units per month until a total of 1,200 such rental units are made available to low-income families.

Site selection for rental units under this program shall take account of accessibility to places of employment of relocatees and shall be conducted in such a way as to ensure equal housing opportunities and a "broad choice of neighborhoods," in accordance with Federal law and policy, to all persons without regard to race, color, religion, or national ancestry.

The City shall provide HUD with monthly reports on units leased and certificates issued including the address of each unit, the percentage of non-white population in the census tract, the rental price of the unit, the subsidy

contracts. By June 15, 1971, specific developments and Section 236 to be made available under rent supplement provided by the City, and confirmation that each such unit has been inspected by the City and found to meet or exceed the applicable local housing code standards, or in the absence thereof, to meet or exceed the housing code standards then in effect for the City.

D.

INCREASED USE OF RENT SUPPLEMENTS

The City and HUD will require developers of Section 236 housing to make available 20 percent of their units under rent supplement contracts. This should provide 600 units within the City of Chicago. HUD should also require units constructed in the metropolitan area under the number of units to be provided will be submitted to HUD.

E.

CHICAGO HOUSING AUTHORITY

1. The Chicago Housing Authority has submitted to the Chicago City Council and the Chicago Plan Commission 275 sites which would provide for construction of approximately 1746 low-income family housing units.

   Community organizations are arranging meetings with representatives of the Housing Authority in order to become fully informed about these proposed developments. At the meetings held to date, a number of the sites have been disapproved in some areas and others approved by the Community organizations.

   The Department of Development and Planning has made preliminary review of the sites and found a number which are not properly zoned, are not appropriate for housing, have been acquired for other public uses, where private construction is already under way, or appear to be unacceptable for a variety of other reasons.

The City Council and the Chicago Plan Commission will give expeditious and full consideration to all the sites as soon as the community meetings and technical reviews permit. Based upon the information presently available, it is expected that many of the sites will not be satisfactory and that alternative locations will need to be determined.

It is anticipated, however, that sites suitable for use by Chicago Housing Authority in accord with applicable law will be identified and processed by the City to permit acquisition by CHA to commence in accordance with the following schedule:

Sites for 500 units by June 15, 1971;

Sites for 350 units by September 15, 1971;

Sites for 850 units by December 15, 1971;

To the extent that sites are necessary in addition to those already given preliminary approval by HUD (see letter to the Executive Director of CHA dated March 3, March 13, and May 28, 1970), such sites will be submitted to HUD for review and determination in an expeditious manner so as not to interfere with the foregoing timetable. It is contemplated that these housing units will be constructed by the Chicago Housing Authority; however, with the concurrence of HUD, some or all of said units may be developed under the turnkey methods.

2. The Chicago Housing Authority, by resolution, authorized its Executive Director to contract with the Cook County Housing Authority to enable the Chicago Housing Authority, in cooperation with the Cook County Housing Authority, to develop in 10 communities outside of the boundaries of the City of Chicago additional sites which will provide for approximately 230 dwelling units. It is anticipated that the CHA will locate additional sites outside Chicago, but within Cook County, for approximately 270 dwelling units and that it will similarly pursue development of such sites in cooperation with the Cook County Housing Authority.

3. The Chicago Housing Authority will lease throughout the metropolitan area, pursuant to Section 23 of the United States Housing Act, not less than 75 housing units for low-income families (by June 15, 1971), and thereafter an additional 75 housing units for low-income families per month until the present 600 unit authorization has been utilized and shall submit a report of progress by June 15, 1971.
4. The Chicago Housing Authority has indicated that it will initiate a program to acquire from FSLIC 200 units, perform the necessary rehabilitation and lease to low-income families. Specific properties will be identified by June 15, 1971, with contracts for rehabilitation award by September 15, 1971.

F.

OTHER DEVELOPMENTS

New financing devices using non-federal sources of money are anticipated to become available which will permit local not-for-profit corporations to undertake development of housing, servicing the needs of families whose incomes are the same as the present CHA eligibility requirements. These developments which rent units to such low-income families will have rents comparable to the Chicago Housing Authority. In addition, to the extent permitted by applicable law, the Chicago Housing Authority may enter into partnership arrangements with not-for-profit sponsors for the development, management, and leasing of units.

The following are the long-range developments which the City of Chicago anticipates that it will undertake in cooperation with the other agencies involved in its continuing effort to provide adequate, safe, and sanitary housing for all of its citizens:

1. The Chicago Housing Authority and the Chicago Dwellings Association have identified a number of sites in the urban area (such as the former Bridewell Farm) for housing development with units to be made

available for moderate and low-income families. This will require cooperation and participation by all levels of government.

2. The City will identify obsolete and deteriorated commercial strip frontage and abandoned or vacant factories throughout the City for development of new housing. The new housing developments must be so established in a comprehensive manner not to overcrowd existing public facilities nor be in detrimental locations. With the many miles of existing strip commercial zoned areas in the City, extensive areas could be acquired and cleared with minimal displacement but with a substantial increase in the housing supply.
3. HUD should require that all developments in the metropolitan area funded through the Illinois Housing Development Authority will provide 10 percent of the units for low-income families. Recognizing that HUD has allocated funds specifically for utilization by State Development Authorities, it is appropriate that part of that fund allocation be conditioned upon the expansion of low-income housing in the metropolitan area.
4. New Communities (New towns in town) within the City are proposed to be developed in such areas as Goose Island, the railroad yards south of the Loop, the obsolete slips and lumber yards along the south branch of the Chicago River and in the Lake Calumet vacant land area. These new communities would provide a range of housing types and prices along with necessary shopping and institutional facilities.
5. All land in the metropolitan area presently owned by the various agencies of offices of the Federal Government should be identified to determine which of the sites (such as Fort Sheridan) could be made available for housing development. Housing developments on these sites should be undertaken to provide a mix of moderate and low-income units with the necessary funding conditioned upon such commitments.
6. In addition to the utilization of modular construction for town house development, explorations are under way for increasing the use of new systems building techniques; such as panel walls and pre-case concrete

slab. A specific Section 236 project that will be site assembled from factory produced components will be under construction shortly.

To the extent that sites for units are acquired and construction under way for low-income families pursuant to programs outlined in this Section F, such units will add to or may substitute for a portion of the proposed units then remaining to be developed under other sections of this part of this letter of intent.

PART II. UNDERTAKINGS BY HUD

It is my understanding that the Department of Housing and Urban Development intends to cooperate with the City in achieving the foregoing objectives by providing funds and other assistance as follows:

A.

LETTER OF CONSENT

HUD will issue a Letter of Consent to permit the City to acquire certain properties included in the Second Year Neighborhood Development Program Application, which properties are identified in Exhibit A, attached hereto; such Letter of Consent to be issued by June 15, 1971, provided the City has made reasonable progress toward achieving the objectives set forth in Part I, above.

B.

ANNUAL CONTRIBUTIONS CONTRACTS

When the Chicago Housing Authority has accomplished the necessary preliminary steps, HUD will execute Annual Contribution Contracts with the CHA and with other appropriate local bodies for the public housing units described in Part I above.

C.

SECTION 235 HOUSING

1. In cooperation with the City of Chicago and its obligations as delineated herein with respect to Section 235 Housing, HUD will issue commitments for mortgage insurance and interest subsidy payments for the 500 single-family or town house units and it is contemplated that the commitments will be issued promptly to assist the City in accomplishing its objectives.
2. In order to implement the City's intention to supply units of Section 235 Housing to low-income families, HUD will promptly approve the use of Model Cities funds to accomplish the objectives as indicated herein.

D.

SPECIAL LEASING PROGRAM

As its matching share for the initial stage of the City of Chicago's special leasing program, HUD will approve the use of up to one million dollars ($1,000,000) of Model Cities funds on a matching basis through December 31, 1971, and thereafter will allow the City to utilize additional federal funds available for such expenditures to assist the City in implementing later stages of its special leasing program, as set forth in Part I above.

E.

MODEL CITIES FUNDS

Upon acceptance of this letter of intent, HUD will approve an amendment to the first year Model Cities Program, extending through June 30, 1971.

HUD promptly will approve the second year Model Cities Program, said second year ending December 31, 1971, provided that the City by June 15, 1971, has approved

sites for 500 units of public housing suitable for use by the Chicago Housing Authority and has made reasonable progress toward achieving the objectives set forth in Part I, above.

F.

SECOND YEAR NDP

HUD promptly will approve full implementation of the second year NDP, said second year ending December 31, 1971, provided that HUD finds the City has by September 30, 1971, reasonably accomplished the objectives set forth in Part I, above.

G.

LOAN AND CAPITAL GRANT CONTRACT

HUD promptly will approve the execution of a Loan and Capital Grant Contract for the Douglas-Lawndale Rehabilitation Project, Project No. Ill. R-129, which project was the subject of a Letter of Consent dated August 2, 1968; provided that HUD finds the City has by September 30, 1971, reasonably accomplished the objectives set forth in Part I, above; and further provided that HUD's obligation in regard to the amount of the capital grant shall not exceed the existing grant reservation for such project.

It is understood between the City of Chicago and the Department of Housing and Urban Development that the basic objectives contemplated by the parties shall continue to be the objectives of the parties in the implementation of the various programs, as set forth herein. The above programs are directed at providing 4300 units of low-income housing. It is understood that changes in Federal or local law or regulations may permit or in fact require modifications to the program outlined above. It is agreed that proposed modifications may be made to this memorandum of intent if concurred in by all signators to this statement. The parties recognize that these objectives can only be achieved through their mu-

tual cooperation and to that end the undersigned each pledge to use their best efforts and full strength of their respective offices in carrying out this letter of intention.

Very truly yours,

/s/ Richard J. Daley
RICHARD J. DALEY, Mayor
of the City of Chicago

CONCURRED:

/s/ Charles R. Swibel
CHARLES R. SWIBEL, Chairman
Chicago Housing Authority

APPROVED:

/s/ Geo. Vavoulis
GEORGE J. VAVOULIS, Regional Administrator
Department of Housing and Urban Development

cc: Charles Swibel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FROM TRANSCRIPT OF
NOVEMBER 28, 1972

* * * *

[121] THE CLERK: Gautreaux versus CHA, adjourned hearing.

MR. POLIKOFF: Call Mr. Martin Sloane to the stand, Your Honor.

MARTIN E. SLOANE,

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POLIKOFF:

Q Will you state your name, please?
A Martin E. Sloane.
Q Spell it for the court reporter, please.
A S-l-o-a-n-e.
Q Where do you live, Mr. Sloane?
A I live in Washington, D. C.
Q By whom are you employed?
A I am employed by the United States Commission on Civil Rights.
Q How long have you been employed by the Commission?
A Six and a half years.
Q Beginning when, if you recall?
A Beginning in April of 1966.
Q And what is your present position with [122] the Commission?
A I am Assistant Staff Director for Civil Rights Program and Policy.
Q Is that the position you have held during the six and a half years?

A No. My first position with the Commission beginning in April of 1966 was as special assistant to the staff director, and in February of 1969 I assumed the position of the assistant staff director.

Q Could you briefly give us your employment history from the time you finished school—I assume you went to school but I will come to that in a moment, until you went to work with the Commission?

A From November, 1958 until February, 1961, I was assistant counsel at the Office of the Controller of the Currency in the U. S. Department of the Treasury; that is the Administrator of National Banks.

From February 1961 until July 1962 I was Chief of the Housing Section of the United States Commission on Civil Rights.

In July of 1962 I transferred to the VAN Housing and Home Finance Agency, which is the [123] predecessor agency of the Department of Housing and Urban Development, as an attorney-advisor working first on civil rights matters and later as a legislative attorney, and I was at the Housing Home Finance Agency and HUD until April of 1966 when I came—

Q Did the Housing and Home Finance Agency become HUD while you were still there?

A Yes, it did. The departmental bill was enacted while I was still with the Agency.

Q So you were with HUD or its predecessor for about four years before you returned to the Civil Rights Commission?

A A little less than four years, that is right.

Q Would you tell us about your education, Mr. Sloane?

A I have a BA Degree from New York University, an MA Degree in English Literature from the University of Michigan and a Law Degree from Columbia University.

Q Are you admitted to practice in any state?

A Yes, I am a member of the New York State Bar.

[124] Q Would you tell me briefly what the nature of your work has been with the Civil Rights Commission?

A Well, as I mentioned, I have been with the Commission two times, and from February 1961 until July of

1962, as Chief of the Housing Section, I had primary responsibility for drafting the Commission's 1961 Report on Housing which dealt largely with the impact of federal housing policies on civil rights.

When I came back to the Commission in 1966, my first assignment was as Deputy Director of the Commission's project on racial isolation in the public schools, which was a project undertaking at the specific request of then President Johnson. And while I had overall responsibility for the quality of the study and report, I had specific and sole responsibility for those sections of that report dealing with the relationship between housing, federal housing policy and school segregation.

Later, when that report was completed, my duties as a special assistant and staff director involved Congressional liaison. I was the Congressional Liaison Officer of the Commission, and this [125] involved preparing testimony and comments on legislation that was pending before the Congress on behalf of the Commission.

Q Could you tell me something, in a general way, about the Commission's involvement in the housing programs and housing policies; what does it do, and has it done any writing on that subject?

A Well, the Commission is a fact-finding agency. It has no enforcement powers or any power to redress individual grievances.

Our essential functions are to find facts and report them to the President and Congress with recommendations for legislative or executive action, and in performing those functions the Commission, from its very inception, and the Commission was established in 1957, has from the inception been intensely interested in the subject of housing. In fact, the very first report of the Commission in 1959, which dealt with three subject areas, included housing as one of the three. And in the course of its history, the Commission has held hearings throughout the country in some 15 cities and metropolitan areas ranging in different geographical areas, cities and metropolitan areas of different [126] sizes.

Q Do you have a list of the cities in which the housing hearings have been held?

A Yes, I do.

Q Just run down the list quickly.

A New York City, Chicago, Atlanta, Georgia, Washington, D.C., Los Angeles, San Francisco, California, Detroit, Michigan, Phoenix, Arizona, Memphis, Tennessee, Newark, New Jersey, Cleveland, Ohio, St. Louis, Missouri, Baltimore, Maryland, and most recently again in Washington, D.C.

In addition—

Q Have any federal housing officials participated in these hearings?

A Yes, they have. In 1959 the hearing in Washington, D.C. was exclusively concerned with federal officials and the policies which they were implementing at the time.

In addition, the hearing that the Commission held in June of 1971 involved high-ranking federal officials concerned with federal housing policy, including Secretary Romney, Attorney General Mitchell and other heads of agencies concerned with housing and urban development. [127] Q Has the subject of federal policies and the impact on housing practices been a part of the subject matter of these hearings?

A Yes, it certainly has, throughout the course of the Commission's history.

Q Has the Commission issued any reports dealing with housing? You have mentioned a section of one report, the racial isolation of the schools. Are there any other reports issued by the Commission on the subject of housing?

A Yes. As I mentioned, the Commission's first report in 1959 to the President and Congress dealt with housing in a very major way. It was one-third of the entire report.

In 1961 an entire volume of a five volume report to the President and Congress was concerned exclusively with housing.

In 1963 a report to the President and Congress dealt in part with housing.

In addition to the section on racial isolation in public schools dealing with housing and federal housing policy, we have done a report on the impact of federal installations, the location of the federal installations on equal housing [128] opportunity.

We have done an intensive study of the operation of the section 235 program of home ownership for lower income families. We published that report in 1971.

In addition, the Commission has done a series of reports, beginning in 1970, evaluating the entire federal civil rights enforcement effort, and a major part of that initial report and the follow-up report has been an evaluation of the Department of Housing and Urban Development and other federal agencies concerned with housing and urban development.

Q Would you describe what role, if any, you have played in the conduct of these hearings and in the preparation of these reports?

A I have been involved in virtually every hearing that the Commission has held on the subject of housing in my stay at the Commission, and I go back to 1961, so all in all about eight years of service with the Commission. In 1961, the Commission Report on Housing, as I mentioned earlier, I drafted it. It was completely responsible at the staff level.

I mentioned that I was also solely [129] responsible for the housing sections of the report on racial isolation in the public schools.

The reports on federal installations and equal housing opportunity and the Section 235 program of home ownership for low income families was done under my supervision by staff members of my office.

In addition, the initial report evaluating the federal civil rights enforcement effort and the follow-up reports also were done under my supervision by staff members of my office with my participation.

Q Have you done any writing on the subject of housing other than for these Commission reports?

A Yes, I have. I have written a number of Law Review articles on housing and equal housing opportunity and at least one article in non-legal journals dealing with the subject of housing and fair housing.

Also, I have prepared testimony for commissioners for the staff director on matters relating to housing for appearances before Congress, and I have appeared myself representing the Commission before Congressional meetings.

[130] Q Mr. Sloane, has your work with the Commission and the Commission's body of work, as you have described it, disclosed any pattern with respect to housing patterns in metropolitan areas across the country?

A Yes, it has.

Q What is the pattern?

MR. MURRAY: Your Honor, may I have a standing objection to this entire line of questioning.

THE COURT: Your objection is overruled at this point, subject to a motion to strike if it appears to be irrelevant to the issues confronting this Court.

You may answer, if you remember the question.

THE WITNESS: Yes, I do, Your Honor.

BY THE WITNESS:

A As I mentioned, the Commission has held hearings in some 15 or 16 cities throughout the country. These are cities of a wide variety. They vary in size, they vary in location, they vary in the kinds of minority group population located there. Nonetheless we found, with certain minor variations, [131] precisely the same pattern in each of these cities and metropolitan areas, and the pattern is—consist of metropolitan areas increasingly separated, separated by the central city versus suburbs, poor versus affluent, black versus white. We found a consistent pattern of new housing going up almost exclusively in suburban areas and occupied almost exclusively by white families.

THE COURT: Read this last few words that he said. He is starting to speed up. It is about the suburban areas.

(Record was read.)

BY THE WITNESS:

A (Continuing) In addition, we have found that centers of employment also have been moving out to suburban areas and the jobs have been filled largely by whites.

In the central city we have found that they have been increasingly characterized by deteriorating housing, deteriorating sometimes to the point where they have to be abandoned, in central cities which are occupied increasingly by the poor and largely by the non-white poor.

In nearly every metropolitan area, [132] what we have found over the last decade, the population of the suburban ring has increased enormously. The population of the central city has either remained static or has declined.

And we have also found that what is responsible for this phenomena in metropolitan areas of population growth has been a massive exodus of white families from the central city, largely to the suburbs, and they have been replaced but not quite by an increase in the black population.

BY MR. POLIKOFF:

Q Now, Mr. Sloane, have you and your work at the Commission and the Commission in its studies and reports examined into the impact of federal housing policies on that pattern of housing practices that you have just described?

A Yes, we have.

Q Would you tell me, if you can—

MR. MURRAY: Your Honor, we have our standing objection.

THE COURT: To all of this, yes.

MR. MURRAY: All right.

THE COURT: You have not missed a thing, Mr. O'Brien.

[133] MR. O'BRIEN: Thank you, Judge.

(At this point Mr. O'Brien entered the courtroom.)

BY MR. POLIKOFF:

Q Would you summarize, please, what the development and impact of the federal policy has been?

A Well, in our view, after—

Q In this respect.

A Yes.

MR. MURRAY: Your Honor, excuse me, but may I also note another objection as to the competency of this witness to testify.

THE COURT: Well, I don't know how you become an expert in this field unless it is being in it for a long time. I am the judge of the competency and credibility of all witnesses, and I will assess it with whatever weight I think his background indicates it is entitled to.

MR. MURRAY: I apologize.

THE COURT: You don't have to apologize. I am glad you gave me a chance to get on the record. I have been waiting for one.

[134] BY MR. POLIKOFF:

Q Do you remember the question, Mr. Sloane?

A Yes, I do.

The federal government, through its housing programs and through its housing agencies, in our opinion, has been a major factor in the development of the residential patterns in metropolitan areas.

Q Could you be specific and explain just how and why you have come to that conclusion?

A Yes. There are two agencies and two sets of programs that I am referring to specifically; one is the Federal Housing Administration which operates mortgage—

Q Is that familiarly known as FHA?

A Yes, it is.

THE COURT: That we are not interested in in this case, are we?

MR. POLIKOFF: We hope to interest Your Honor in this.

THE COURT: You are trying to explode this all over the country. I will be settling people in Utah pretty soon if I let you go on.

MR. POLIKOFF: Your Honor, I will make [135] you one promise, that we are not talking about Utah or even about any other state than Illinois.

THE COURT: There is more land out there.

MR. POLIKOFF: But there is a lot of land in the suburban areas too, Your Honor, within Illinois.

THE COURT: At the price of Utah land?

MR. POLIKOFF: Let me say to Your Honor as to price, you may recall that we sent Your Honor a letter, which is part of the record in this case, maybe I should introduce it in evidence so we have got it here conveniently, pointing out that there is no land cost limit with respect to the public housing program. And, indeed—

THE COURT: Well, I assume that whoever is furnishing the money is not going to let them buy a lot on Wall Street for a million bucks to put up a two story housing unit. There must be some limitation.

MR. POLIKOFF: That is correct, Your Honor, but in the approval—

THE COURT: I know the country is profligate, but I didn't think it was that [136] profligate.

MR. POLIKOFF: In the approval of the development plan that is now in the pipeline, project 285, CHA's program, approved by HUD, the following appears in the letter from HUD, which is part of the record in this case.

Mr. O'Brien, this is Attachment No. 1 to CHA's report of September 30th, 1971, which has been filed before Your Honor.

HUD says to Mr. Humphrey, "Thirty-six of these sites are approved for further development. Although specific costs of a certain few sites is estimated to be as high as $12,500 per unit, the average cost per unit is estimated to be $4,100 odd dollars."

So that we have even within the city, in the specific programs involved in this case, site aprovals for land acquisition only that go in excess of $12,000 per unit, and as our letter to Your Honor pointed out, the aggregation of units, the three, six, ten on a single site can produce substantially large amounts of money for specific site acquisitions, all within a framework, Your Honor, of

there [137] being no statutory limits on the amount that can be spent for land for the public housing program.

MR. MURRAY: Your Honor, I would like to correct a misimpression that Mr. Polikoff is conveying to Your Honor about land cost. This is totally irrelevant in our opinion, but under the Housing Act, under Section 2, under the definition of the United States Housing Act, it says, "The term 'low rent housing' means decent, safe, sanitary dwellings within the financial reach of families of low income and developed and administered to promote serviceability, efficiency, and economy and stability."

Section 2, subparagraph 8 says, "The term 'acquisition cost' means the amount prudently required to be expended by a public housing agency in acquiring a low rent housing project or a slum clearance project." So there is some discretion with respect to land cost, and I think the observation Your Honor made in that regard is perfectly reasonable.

THE COURT: All right, let's go on, Mr. [138] Polikoff.

BY MR. POLIKOFF:

Q Would you go on, Mr. Sloane, and talk about the role, as you have seen it, with the Federal Housing Administration and relate that specifically, because so far in this case—

THE COURT: Just a minute, Counsel. I started out with some cases by your Plaintiffs against HUD and CHA. They had to do with low income housing. I ascertained and so declared, and it is the law of the district, of the circuit, that there had been over 20 years of discrimination in building low income housing. We set up an effort to—well, first of all, we stopped it from continuing in the future and suggested some remedies to try to overcome what had been done in the past. FHA and that type of thing was not in that lawsuit. I don't know how you are going to drag it screaming by the heels into this lawsuit. I wish you would indicate—

MR. POLIKOFF: I will try to do that, Your Honor. We are not going to drag it into this lawsuit. There is no agency known as FHA [139] anymore that is independent. FHA is a constituent of HUD, has no separate

corporate or other existence. It is an agency within HUD. And we are going to respond to Your Honor's—

THE COURT: Does FHA limit itself to low income housing, which I think is the subject matter of this lawsuit?

MR. POLIKOFF: It does not limit itself to it but it has programs which include low income housing.

THE COURT: Well, then, limit his remarks to the programs that include low income housing.

MR. POLIKOFF: Well, if Your Honor will permit, you asked a question yesterday, or you made a comment yesterday when I said that we were going to show, or we were going to try to show, that the past activities of HUD had helped to produce the segregated situation not only within the cities and within the suburbs, but city against suburb that constitute a part of the problem of relief in the case. If we didn't have, Your Honor, a white segregated suburb surrounding an increasingly black [140] segregated city, we would not be here asking Your Honor for the form of relief we are asking.

THE COURT: Isn't this an economic matter rather than a racial matter?

MR. POLIKOFF: No, Your Honor.

THE COURT: It isn't?

MR. POLIKOFF: It is a matter that—

THE COURT: I have some black neighbors that are able to live in the suburbs. You have some black neighbors that are able to live in the suburbs. It is an economic matter.

MR. POLIKOFF: Well, the evidence will show, Your Honor, that there are public housing projects in the suburbs, but they are in the ghettoized areas of the suburbs exclusively.

THE COURT: Well, we will wait until that evidence gets here.

MR. MURRAY: I am going to object to Counsel testifying. This is far beyond the allegations of the complaint.

THE COURT: He is trying to tell me what he anticipates the evidence will show. I am waiting for this to occur.

[141] You may proceed.

BY MR. POLIKOFF:

Q All right, will you succinctly, Mr. Sloane, describe the role of the FHA in developing the pattern and contributing to the pattern you mentioned a moment ago?

A Yes. Within the first 15 years of FHA's existence, that is from 1934 to roughly 1949, this federal agency was an active exponent of racial segregation and racial discrimination in housing.

MR. MURRAY: I am going to object to that, Your Honor. That statement should be stricken from the record. There is no factual basis in this record to show that FHA, prior to 1965—it was never a part of the Department of Housing under Urban Development, and that statement has no support in this record and it is beyond the scope of the allegations in the complaint. We are not dealing with the Federal Housing Administration, and I move that that remark be stricken from the record as being irrelevant and immaterial and not supported by the facts.

THE COURT: This is, Mr. Murray, just like a psychiatrist who comes in as an expert and [142] gives an opinion of the mental condition of someone that he has —a patient that he has seen. He makes a statement that he is or he isn't nuts, and then he must give a reason and then when they start giving those reasons, you laugh them out of Court.

Now, I am going to let him say what he says, and then we will listen to his reasons and see whether we have to laugh him out of Court.

BY MR. POLIKOFF:

Q Will you state the reasons, Mr. Sloane, for the conclusion that you just stated a moment ago?

A That FHA—

Q The factual basis on which you said what you just said.

A FHA's own underwriting manuals from the beginning until roughly 1947 contained instructions to its underwriters that they should avoid subdivisions which had what was called "inharmonious racial groups." They also warned about the—

THE COURT: Tell us about how FHA functions in these underwriters? Are you [143] talking now about banks and savings and loans who are agents of FHA or who are seeking compensation from FHA or funds from FHA to loan for them to make money on?

THE WITNESS: Your Honor, I am talking about FHA employees who evaluate the merits of—

THE COURT: Who are the underwriters that you just referred to? What function do they perform? Tell me what an underwriter is.

THE WITNESS: Well, FHA underwriters evaluate applications made by builders who are coming in for FHA assistance in setting up the subdivisions, and this is one of the—was one of the prime—

THE COURT: And are the FHA underwriters, are they employees of FHA or are they other agencies, lending institutions?

THE WITNESS: They are employees of FHA.

THE COURT: All right.

THE WITNESS: And the FHA also advised its underwriters—

BY MR. POLIKOFF:

Q Is "underwriter" a descriptive term of a [144] category of employees?

A Actually it was appraisers that were being advised. The manual is called the underwriting manual and it was issued to FHA employees, and it was for the purpose of guiding them in making their decisions and evaluations about the merits of applications for subdivision assistance.

Q All right, continue.

A FHA also, in its underwriting manual, advised of the necessity for the filing of racially restrictive covenants.

MR. O'BRIEN: Your Honor, if it please the Court I have to object to this. Here is a man rambling on about manuals. If the manuals exist, I can read a lot faster than he can tell me about it, and I object on the technical ground but also to try to bring these proceedings to some termination point.

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THE COURT: In view of the fact, Mr. O'Brien, that your client has nothing to do with FHA—do they?

MR. O'BRIEN: No, sir. But there is something offensive about, to me, being in a courtroom and having a man rambling on about [145] what some document not in Court says. I do not like to take his word for it, I would like to read the document and, as I say, I can read in silence a lot faster than sitting here listening to this interminable testimony.

MR. MURRAY: Your Honor, we will join in the objection.

THE COURT: You know, when you get to Washington you acquire a lot of scoop and then you have to have a public forum to release it on. Now, let's not spoil one of the functions of bureaucrats in Washington. Let's let him go for awhile. This evidence in regard to FHA does not apply to your client, of course, and it may not apply to anything in the lawsuit, but I am going to let him go on.

MR. POLIKOFF: Your Honor, we are cognizant of the pending motion to strike anything that you deem to be irrelevant. This testimony will not be lengthy. I promise you that in my opinion it is relevant.

THE COURT: It will be lengthier if you don't get back to it, which I gave you permission to do.

[146] BY MR. POLIKOFF:

Q All right, you have got an invitation and permission to proceed, Mr. Sloane.

A FHA's policy, in the Commission's view, was one that could be characterized as separate for whites and nothing for blacks. In fact, as late as 1959 the Commission estimated that the post-war housing, much of which —that was built with FHA assistance, only two per cent or less than two per cent had actually gone to nonwhites. And the importance of FHA lay in two parts, one, it represented a major portion of the housing market, and particularly the post-World War II housing market, and its policy naturally affected the housing which it controlled. Also, FHA was a leader in the entire housing and home finance community, and its practices and policies, and particularly its practices and policies with regard to racial discrimination, tended to be adopted by the private housing and home finance industry.

Q Was the operation of this financing program, this mortgage finance program you just described, primarily in the suburban areas?

A Yes, it was.

[147] Q What role did FHA play during this period in the inner cities, that is the central cities?

A Virtually no role at all. It virtually excluded the central city from the benefits of its program, red-lining, in effect, excluding—

Q What was the phrase?

A Red-lining.

Q What does that mean?

A Excluding large sections of the central city, rendering them ineligible for FHA mortgage insurance.

Q What was the effect of the combined racial harmony policy in the suburbs and red-lining in the city?

A Well, it tended to further encourage white flight from the central city by facilitating their acquisition of decent housing in the suburbs and making it almost impossible for whites to obtain decent housing in the central city by making mortgage money unavailable.

Q Now, did you also study in your work at the Commission the operation of the public housing program during this same historical period?

A Yes, we did.

[148] Q Would you tell us what the Commission's examinations of that program disclosed?

A The public housing program as administered originally by the United States Housing Authority operated somewhat differently than FHA. The United States Housing Authority, from the beginning, insisted that minorities get their fair share of housing. With respect to whether this fair share would be acquired on a racially segregated or racially integrated basis, the United States Housing Authority and its successor agen-

cies took no position at all. Their position was that this was up to local housing authorities.

Q In fact, how did the public housing program operate?

A On the basis of Commission investigation in nearly every community we looked at, public housing was provided on a racially segregated basis.

Q Was the segregation practiced with respect to both site selection and tenant assignment or only one of those?

A No, both. Separate lists of applicants generally was kept, and on the basis of race, and tenant assignments were made on the basis of those [149] racially separate lists.

In addition, site selection policies generally were that sites for black projects were selected in black areas and sites for projects designated for white occupancy were selected in white areas.

THE COURT: Have you any evidence of that in Chicago?

THE WITNESS: Your Honor, I do not have that evidence personally.

THE COURT: All right.

Do you include Chicago as illustrative of what you just said?

THE WITNESS: Your Honor, this is the pattern that we found nationwide.

THE COURT: I don't know why I am concerned with nationwide if it hasn't any local application, Mr. Polikoff.

MR. POLIKOFF: The relevance of nationwide, Your Honor, is that if—as will come in a moment—if HUD's best efforts are to be considered as a possible reliance here, we are interested in what HUD has done generally and not just in Chicago, and I want to remind Your [150] Honor that the evidence—I may have missed what your question was directed to. If it is directed to the specific coding kind of tenant assignment practices, we do have evidence in the case that that was employed in Chicago.

THE COURT: I mean, we have rectified that, haven't we?

MR. POLIKOFF: Pardon?

THE COURT: Haven't we rectified that?

MR. POLIKOFF: By your order of July 1, '69.

THE COURT: So that is no longer a problem confronting the Court.

MR. POLIKOFF: That is correct, but—

THE COURT: We have no problem, as I understand it right now, in regard to segregated new housing.

MR. POLIKOFF: We are talking, Your Honor, the relevance of what we are saying is that Your Honor as a court of equity ought to know what has contributed and who has contributed to the situation that now confronts the Court, at least in the opinion of the Plaintiffs, [151] with respect to the difficulty of providing an effective remedy, and the historical—

THE COURT: As I understand it, what has brought this about has been the contumacious conduct of the city administration and the Council. That is what brought about this lawsuit and that is what we have endeavored to rectify by the order heretofore entered.

MR. POLIKOFF: And in rectifying it you are confronted with a fact, which I am going to insist that you cannot ignore, and that fact is that the City of Chicago is going increasingly black and the suburbs are remaining substantially white, and the reason that that situation exists is in part because the Defendant, the Department of Housing and Urban Development, has, over the years, carried on the dual kind of policy that Mr. Sloane has described, facilitating through the FHA operation the development of all white suburbs and facilitating, if you will, the maintenance and preservation through the public housing program and the FHA red-lining program of the all black cities that we are [152] increasingly faced with. And that, Your Honor, is a problem for relief in your case.

If for example—let me just digress for a moment into an argument.

MR. MURRAY: Your Honor, let's proceed with the testimony, and if Counsel wants to make closing arguments, he can at the proper time.

THE COURT: He is going to make closing arguments. He always does. Let's go on and get this witness off the stand.

MR. POLIKOFF: All right, Your Honor.

BY MR. POLIKOFF:

Q Mr. Sloane, have you also examined the current operation of federal housing programs as distinguished from the history of their past operation that you have described for us?

A Yes, we have.

Q Have you in particular examined the description which HUD filed in this case on April 26, 1972, of its current programs? I am referring to that 62 page document that describes its program?

A Yes, I have.

Q Are you, from your work with the Commission and study of housing practices, are you generally [153] familiar with the HUD programs that are described in that document?

A Yes, I am.

Q Would you tell the Court which of the programs that are listed in that 62 page document provide housing or are designed specifically to provide housing for low income people?

A There are four specific programs.

Q And which are they?

A One is low rent public housing. The second is—

Q That is the conventional public housing program of the sort run by CHA?

A That is right.

Second is the rent supplement program, which reaches the same income group as the public housing program. And then there is the Section 235 program of home ownership for lower income families and its companion program, Section 236 of rental housing for low income families. These latter two programs are primarily for families of moderate income, but there is a considerable overlap with the families eligible for public housing.

Q So we have got two programs for low income [154] housing and two for moderate which overlap at the upper end of the income scale, is that right?

A That is correct.

Q Don't the other programs that are listed in the 62 pages also provide low income housing?

A By and large, these are community development programs which while they may have a housing element in them, they are not housing programs; for example, in urban renewal or in new communities, if the plan calls for low income housing, the sponsor must come in under one of the four programs I described earlier, but these are either urban renewal or new communities or other community development programs that carry provisions for housing themselves.

Q So that if anyone is going to provide low income housing in connection, let's say, with an urban renewal development, the provisions of that low income housing would flow through one of the four programs you described?

A That is right.

Q Even though it may have its inception in an urban renewal effort of some sort?

A Yes, sir.

[155] Q Has the Commission studied the current operation of these four low income housing programs?

A Yes, we have.

Q Have you studied any of them intensively?

A Yes, as I mentioned earlier, we did do an intensive investigation of the Section 235 program, and that resulted in a report issued in 1971. And our study was conducted at the time when the two years had already elapsed after enactment of the Federal Fair Housing law, Title A of the Civil Rights Act of 1968.

Q Could you tell me what the study of these four programs has disclosed so far as racial patterns are concerned, both as to occupancy and location?

MR. MURRAY: Your Honor, I'm going to object to this testimony. I think the best evidence of what the report discloses is the report itself.

THE COURT: I would rather listen to him than read the report.

The objection is overruled.

BY THE WITNESS:

A (Continuing) In connection with our study of the Section 235 program, we looked intensively—

[156] THE COURT: You may cross examine him and destroy him if there is something he is saying that is not backed up by the report, and I encourage you to—

MR. MURRAY: It is very difficult for me to cross examine when I asked the Plaintiffs to produce all documents and state all facts which they were to rely upon and I didn't get the documents, Your Honor.

THE COURT: That is the function of cross examination.

You may proceed.

BY THE WITNESS:

A (Continuing) In connection with our study of the 235 program, we looked intensively at four cities and metropolitan areas. They were Philadelphia, St. Louis, Little Rock, Arkansas, and Denver, Colorado, and we found that the pattern in these four cities was the same, despite the fact that they are geographically separate and very different in terms of size.

BY MR. POLIKOFF:

Q And what is the pattern?

A The pattern was that inner city housing [157] used under the program was generally deteriorated, dilapidated, often going to black families. New housing frequently was going up in the suburbs and it was occupied exclusively by white families.

Q Did Secretary Romney testify before the Commission in respect of that particular study?

A Yes, he did, in June of 1971, and the Commission asked him, presented to him our findings in connection with this Section 235 study, and he agreed that this was true, that our findings of racially separate occupancy was indeed true. He also conceded that this was true—

MR. MURRAY: Objection, Your Honor.

THE COURT: Overruled.

BY THE WITNESS:

A (Continuing) —of the housing market generally. He said, "You don't have to convince me that we have had and still do have a dual housing market."

THE COURT: Is there any question in your mind that what you call the white suburbs could be classified also as the affluent suburbs and the black inner city could be [158] classified as the poor inner city?

THE WITNESS: Your Honor, the interesting thing about this study—

THE COURT: Would you like to answer my question or would you like to duck that one?

THE WITNES: I, Your Honor?

MR. POLIKOFF: The question is directed to you, Mr. Sloane.

THE WITNESS: I don't want to duck it, Your Honor.

THE COURT: The question is, would you say that the white suburbs are the more affluent of the two classes?

THE WITNESS: Yes, I would, Your Honor.

THE COURT: And that the black residents of the central city are in a lower state of poverty than the suburbanites?

THE WITNESS: Generally, yes, but our study shows that here we had housing which was within the same income limits, eligible families, white or black, within the same relatively low income limits, and yet the precise pattern found in the general housing market was found in connection with the 235 program, and the economic rationale, [159] which is often presented, simply wasn't there.

BY MR. POLIKOFF:

Q In other words, Mr. Sloane, this description you just gave of the 235 low income housing, at least so far as the overlap is concerned—

A That is right.

Q —and that was placed in the suburbs, is that correct?

A That is right.

Q And it was nonetheless occupied exclusively or largely by whites?

A That is right.

Q And the same housing, that is for the same income level in the cities, tended to be occupied exclusively by blacks?

A Yes. And we also looked into reasons why this pattern was repeated in connection with the 235 program.

Q And what was that—

A We found it wasn't an accident. We found the same factors, overt discrimination or subtle forms of discrimination by representatives of the private housing and home finance industry were responsible, racial steering by real estate brokers, [160] steering in the sense of telling black families "This is the house that you have to buy. There is nothing else."

Telling white families, "You don't want to live there You want to live here."

This discrimination through advertising by FHA to build—

THE COURT: We are correcting all of those things in Court day after day. I have had a dozen cases like that before me. It no longer has to be done by changing the rules for FHA. They bring them into Court and fine them and put them out of business. That has had more effect than your Commission or all of the other commissions that I am aware of.

BY MR. POLIKOFF:

Q Mr. Sloane, did I ask you whether you explored the other three programs and found the same pattern?

A Yes, we have. We have not explored those three programs in as much depth as the 235 program, but we have kept a continuing interest in their operation from the beginning.

Q Have you examined the current project [161] selection criteria of the Department of Housing and Urban Development for the site selection aspect of these programs?

A Yes. The Commission has looked at them very closely and provided comments on two occasions to the

Department of Housing and Urban Development, and those comments were prepared under my direction.

Q And could you summarize for us succinctly what the nature of the comments is?

MR. MURRAY: Your Honor, I am going to object. I assume these comments are in writing, Mr. Sloane?

THE WITNESS: Yes, they were.

MR. MURRAY: I am going to object. I think the best evidence as to what comments of the Civil Rights Commission were is the document itself.

THE COURT: Are there such documents available?

MR. POLIKOFF: Yes, Your Honor. Mr. Murray knows them well. In case he doesn't have them handy, I will give him extra copies, but they are lengthy letters and there is certainly nothing wrong with having a witness [162] state, so that the Court and everybody else can understand succinctly what they amount to.

MR. MURRAY: I would like the record to be clear on this, Your Honor. This is the first time I have seen these documents.

THE COURT: All right.

MR. POLIKOFF: They are addressed to Mr. Murray's boss in this case, Your Honor, Mr. Romney.

MR. MURRAY: Well, he won't be for very long, Your Honor.

BY MR. POLIKOFF:

Q Go ahead, Mr. Sloane.

A Well, the basic problem that the Commission has would be project selection criteria, which were essentially site selection criteria to facilitate equal opportunity, is that these project selection criteria do not represent a comprehensive metropolitan wide plan, rather they represent a project by project approach, and in the Commission's view this kind of an approach is incapable of making very much of a dent in terms of reversing patterns of racial segregation in residents.

Q Did the Commission state why the private [162] selection criteria and the project by project approach lacked that potential?

A Yes. Essentially there is nothing to compare each project application with, to take it on its own merits, and

in our view this is no way to accomplish a metropolitan wide desegregation.

THE COURT: In your opinion or your Commission's opinion?

BY MR. POLIKOFF:

Q Have you examined the proposed judgment order submitted by the Plaintiffs in this case, Mr. Sloane?

A Yes, I have.

Q Does it provide a plan of the sort the Commission has said is lacking in the project selection criteria?

A Yes, it does. I think it is superior in at least two respects, one is that it does represent a plan by which some effort at accomplishing metropolitan wide desegregation, or at least reversing the current trend toward metropolitan segregation can be accomplished. Secondly, and equally important, is that it does provide some assurance that once the sites to public housing are found in non-segregated [164] areas, that the public housing applicants, those on the waiting lists as the Plaintiffs' class will get a priority in acquiring housing at those sites, and this also is lacking in—

Q In other words, there is no assurance under the project selection criteria that any member of the Plaintiff class can have access to any public housing project if in fact it is provided?

A That is right, there is no assurance whatsoever.

THE COURT: Are you aware that CHA has been authorized for three and a half years to find suburban sites for 500 units in the suburbs, and as a result of the three and a half years they found none? Are you aware of that?

THE WITNESS: Yes, I am.

THE COURT: All right.

BY MR. POLIKOFF:

Q Incidentally, with respect to their finding none, Mr. Sloane, zoning was mentioned here yesterday, is the public housing program one that by contrast with these other programs that you mentioned, for example, 235, has access in theory to suburban areas with respect to zoning problems, is it—that is a [165] poor way to ask a question. Let me try and see if I can do better.

Is the public housing program any more susceptible than, say, the 235 program to the kind of exclusionary zoning practice that would preclude it from being located in suburban areas?

A It is easier to overcome those exclusionary practices in public housing.

Q Why is that?

A In that, for example, large lot zoning ordinances have the effect of increasing the cost of land, and we are dealing with programs like rent supplements or Section 235 or 236. There are statutory limits on the cost of housing which may not be exceeded, and this includes the cost of land. In public housing the cost of land is not included by statute in the project development cost.

Q Mr. Sloane, the HUD order that is proposed in this case is essentially what has been called a best efforts order, relying on the best efforts of HUD in carrying out and administering its existing program to provide relief for the Plaintiff class; based on your studies of the HUD programs in operation, its predecessor in current programs, and [166] particularly on your study for the Commission of the four programs that focus on low income housing, in your opinion would the Court be warranted in relying upon HUD's best efforts to remedy the effect of racial segregation in the public housing program in Chicago?

A In my opinion past experience suggests that HUD cannot be relied upon absent other constraints from using its own best efforts.

Q Can you explain why you hold that opinion?

A Its entire history, and I can give one specific example—

THE COURT: You know history changed three years ago.

THE WITNESS: Your Honor, I can give one specific example, when HUD was under an affirmative obligation, affirmative general obligation to stop discrimination—

BY MR. POLIKOFF:

Q Will you give us that? Was that within the last three years or not?

A No, it was prior to the last three years. It was when President Kennedy issued his executive order on equal opportunity and housing directing [167] all agencies of then Housing and Home Finance Agency to prevent discrimination, and the response of the two agencies, the agencies of HHFA suggest clearly to me that they cannot be relied upon to respond to simply a general directive. The Federal Housing Administration chose as its sole mechanism for carrying out the directive the processing of individual complaints. I was with the Housing and Home Finance Agency at the time. There were precious few complaints that came in.

Q Let's come down to more recent history. The Judge has said history changed three years ago. In 1968 there was a Fair Housing Law passed, was there not?

A Yes, there was.

Q Specifically imposing upon HUD an affirmative obligation to provide fair housing, correct?

A That is right.

Q You described your examination of the 235 low and moderate income housing program; did that examination postdate or predate the Fair Housing Law of 1968?

A It postdated it. Our investigation occurred during the latter part of 1970 and early [168] 1971, which was two and a half to three years after Title 8 had been enacted.

Q And is it a fact then that notwithstanding the 1968 Fair Housing Law mandate, subsequently the 235 program was operated with the racially segregated effect that you described?

A That is right.

MR. MURRAY: Your Honor, I am going to object to that. It is totally irrelevant.

THE COURT: Is 235 involved in our lawsuit?

MR. MURRAY: No, it is not, Your Honor. In fact, Your Honor, we made comment to that particular matter in—

THE COURT: I assume that you have not forgotten your right to move to strike?

MR. MURRAY: I have not, Your Honor.

MR. POLIKOFF: Your Honor, 235, as has been testified, is a program that overlaps the low income housing—I am sorry, the low income level of people who are eligible for public housing. It is one of the programs that was specifically mentioned in the Court of Appeals opinion as a possible method of [169] relief in this case. And the general relevance of what has been testified to goes beyond the particular program, even though that program is relevant, as I have just said, because what we are talking about here is your question, can't I rely on HUD's best efforts. Give them a try.

Here is an illustration, a recent illustration postdating the three year period you mentioned in which HUD's best efforts, in a program that involves low income housing, has produced the same racial segregation pattern that you are familiar with in the public housing field.

THE COURT: Is that in Chicago, Mr. Sloane?

THE WITNESS: Chicago, Your Honor, was not one of the four cities that we investigated.

BY MR. POLIKOFF:

Q Did you find any difference in any city across the country in the way—was there any exceptions to the pattern you described?

A There was not.

Q Incidentally, is low income housing provided in the private market in this country today, [170] that is, apart from a HUD program or a conventional public housing program?

A Aside from mobile homes, no, the private market is incapable of producing housing within the reach of low income families.

Q So that the kind of people we are talking about get housing, if at all, through these government programs?

A. That is right.

MR. POLIKOFF: I have no further questions, Your Honor.

THE COURT: Mr. Murray?

CROSS EXAMINATION

BY MR. MURRAY:

Q Mr. Witness,, you testified concerning the FHA housing manual, I believe, prior to 1947, is that correct?

A That is right.

Q The policies of FHA. And you are an attorney, is that not correct?

A That is right.

Q Are you familiar with the case of Plessy versus Fergeson?

A Yes, I am.

[171] Q What did that case hold?

A It held that state law requiring separate accommodations on railroad cars did not violate the equal protection clause of the Constitution.

Q And that was the claim of separate but equal case, is that correct?

A It is my understanding it is.

Q And Brown versus the Board of Education was not decided until 1954, is that not correct?

A That is right.

Q And is it not a fact, sir, and I am directing your attention to the low income housing program, that the federal government has removed itself from the direct construction and management of housing. The local communities, either through their local government or through special housing authorities were to decide whether or not they wanted to come under the program and, if so, how many housing units they want. The properties were to be owned and managed by the localities. Is that a fair statement as to the statutory set-up?

A I am not sure what you are reading from, sir.

Q Well, I'm asking you if that is a fair [172] statement?

THE COURT: Listen to what he says and answer his question as to whether that is a fair summary as to what the various functions of the various participants in these programs is.

BY THE WITNESS:

A To the extent that this suggests the federal government has no role in the provision of low income housing I would not agree.

BY MR. MURRAY:

Q You would not agree?

A I said to the extent that this suggests that the federal government has no role.

Q The role—let me make it clear.

Except for the funding and using its credit and finance, that is the role the federal government has, is that not correct?

A No.

Q Well, —all right.

THE COURT: You are going to find out what your duties are from this witness.

MR. MURRAY: Yes, it seems that way. I must have misread the statute.

[173] THE WITNESS: The federal government does more than just provide—

MR. MURRAY: Let me—Mr. Witness, please.

THE COURT: Don't argue with him. Ask another question.

BY MR. MURRAY:

Q Under the declaration of policy of the Low Rent Housing Act of 1937, it is hereby declared to be the policy of the United States to promote the general welfare of the nation by employing its funds and credits; is that not what the declaration of the policy is, funds and credit?

A I think the policy goes beyond that.

Q Would you please answer my question, Mr. Witness, yes or no? Isn't that what the declaration of the policy says, funds and credit of the United States?

A That is not a complete statement of the declaration of the policy.

Q Directing your attention to the rent supplement program, are you aware that under the second supplemental appropriation act of 1966, Public Law 89-426, approved on May 13, 1966, no part of the appropriations or contract authority [174] could be used to incur any

obligations in connection with any dwelling unit or project which is not either part of a workable program or which is without local official approval for participation in the rent supplement program? Is that not correct, sir?

A Yes.

Q Thank you.

And with respect to Section 235, is it not correct that 235 has certain mortgage limits on it? Is that not correct?

A Yes, it is.

Q I believe the maximum amount—and that mortgage limit is related to the number of bedrooms in that particular project, is that not correct?

A To some extent, yes.

Q And that the maximum amount of mortgage that can be obtained under Section 235 is approximately, I believe, $24,400, is that not correct?

A I believe that is roughly correct.

Q You did say you read our submission to the Court dated April 26, is that not correct?

A Yes.

Q And I believe we stated in that submission, [175] with respect to 235 housing, it has been the experience of HUD, in relationship to this program, that this program, due to the inflationary cost and the increases in taxes since this enactment, that it does not meet the needs for low income public housing tenants; did you read that statement, sir?

A What page are you referring to?

MR. MURRAY: Strike that last question.

BY MR. MURRAY:

Q Is it a fair statement that—

THE COURT: Well, then, we will strike the answer —well, he didn't make one. All right.

MR. MURRAY: Yes.

BY MR. MURRAY:

Q Is it a fair—in your investigations, wasn't it your experience that the program, due to inflationary costs and increase in taxes since enactment, that it in fact does not meet the needs of low income housing tenants?

A This wasn't the fact.

Q This wasn't part of your examination?

A What we found, first of all, is that the program is geared to public housing income levels. [176] The maximum income level for the participation program is 135 per cent of the initial occupancy for public housing. The subsidy is, of course, not deep enough to reach truly low income families. The subsidy amounts to reducing the interest rate to one per cent, but it does have a considerable overlap, as I testified to before. It is essentially a moderate income program.

Q All right. Let me ask you this, does HUD provide a subsidy for the taxes to be assessed against the property?

A I am not sure.

Q You don't know?

A No.

Q All right, and what about operation and maintenance costs and upkeep of the property, do they provide subsidies for that?

A I believe not.

Q Other than the interest subsidies, is it not a fact that HUD does not provide any assistance whatsoever to meet those costs?

A There is a program which was enacted subsequent to the Section 235 program to deal with the problem of low income families who had been in effect [177] sold a bill of goods when they purchased the house under the 235 programs.

Q That is with respect to defects existing in the house?

A That is right; that is right.

Q You said part of the function of the Commission is to recommend to Congress certain legislative suggestions as they relate to housing, I presume; is that not correct, that is part of your function?

A Yes.

Q And have you suggested or has the Commission suggested in any of its papers and submissions to Congress that the requirement that a local resolution be forthcoming before any preliminary loans may be granted by HUD, and the execution of a cooperation agreement

must be entered into before any annual contributions are submitted be eliminated from the housing program?

A Yes. The Commission on several occasions has recommended that all forms of local government veto over the operation of low income housing programs be eliminated.

Q And has it not been the fact that Congress [178] has consistently enacted that particular section since the inception of the 1937 Act?

A Well, we are making some progress in that the workable program requirement—

Q Would you answer my question?

THE COURT: That is not the question.

MR. MURRAY: Mr. Reporter, would you read the question.

THE COURT: Has Congress followed your recommendation?

That is the shortest way to ask it.

MR. MURRAY: Right.

THE WITNESS: In part, Congress has.

THE COURT: They removed the veto power? They have?

THE WITNESS: One form of veto power which was the workable program in connection with public housing and the 221(d)(3) program, those two have been removed. Those two have been removed, which was a moderate income housing program. In other respects Congress has not yet responded to the Commission's recommendation.

[179] BY MR. MURRAY:

Q 221(d)(3) is not currently funded by Congress, is that correct?

A It is being phased out, is my understanding.

Q And part of the thing that you like about Plaintiffs' proposed judgment order is that it bypasses that particular federal statute, is that not correct? It sets aside, it contemplates that it will be set aside. You did read the judgment order?

A Yes, I did.

Q And is it not a fact that that judgment order contemplates that that particular federal statute which you have just testified to, local determination, is to be set aside?

A Only in the event that at some time in the future if cooperation cannot be achieved.

THE COURT: Well, you are aware of the cooperation that has existed in the last three years in regard to placing 500 units in the suburbs; do you see any reason why that might tend to diminish?

THE WITNESS: Your Honor, I am not that [180] familiar with the local situation.

THE COURT: I mean you are aware that CHA has had authority to place 500 units in the suburbs in the last three and a half years.

THE WITNESS: Yes, I am.

THE COURT: You are aware that they have not done so.

THE WITNESS: That is right.

THE COURT: You think that might be due possibly to the lack of cooperation by the municipalities?

THE WITNESS: I would tend to think it would be.

THE COURT: All right. And you anticipate that that is going to terminate shortly, this lack of cooperation?

THE WITNESS: I have no—

THE COURT: Voluntarily?

THE WITNESS: I ordinarily would doubt it. I have no way of knowing specifically, sir.

THE COURT: Aren't you aware that this order contemplates that this Court step in where Congress has refused to do so and compel these municipalities to not do what the law [181] requires them to do? You are aware of that, aren't you?

THE WITNESS: Yes, sir.

THE COURT: All right, just so we understand what we are talking about.

BY MR. MURRAY:

Q With respect to the letters that Mr. Polikoff handed to me that the Civil Rights Commission sent to Mr.

Romney with respect to the site selection policies, do you have copies of those letters?

A Yes, I do.

THE COURT: Well, I think while he is looking for them we will take a five minute recess.

(A recess was taken.)

THE COURT: You may resume the stand, Mr. Witness.

MR. MURRAY: Mr. Court Reporter, could you please read back where we left off.

(The record was read.)

BY MR. MURRAY:

Q Do you have a copy of that letter?

A Yes, I do.

[182] Q Referring to Page 2 of that letter, do you have a copy of it, of the November 4th, 1971 letter?

A Yes.

Q The third full paragraph down, reading from the top line there in the first full sentence which reads, "The recent decision of the United States Court of Appeals for the Seventh Circuit in Gautreaux versus Romney, decided December 10th, followed by Judge Austin's order of October 1st, 1971 implementing that decision clearly illustrates that HUD has an obligation not only to avoid acting in a discriminatory fashion, but to act affirmatively to prevent housing discrimination and segregation"; that is what the letter says?

A Yes.

Q You are aware, are you not, Counsel, that the October 1, 1971 order of Judge Austin was reversed by the Seventh Circuit? You are aware of that?

A Yes.

Q Is it not a fact that the red-lining process that you testified to is no longer used?

A That is correct. It stopped in the mid-1960's.

[183] Q Is it not a fact that the site selection criteria, the current site selection criteria, applies to the FHA program currently in existence now? Is that correct—and operational?

A The lower income programs, 235, 236, the rent supplements.

Q Is that correct?

A That is right.

THE COURT: Isn't that what we are interested in, low income?

MR. MURRAY: That is assuming his observation, all programs, I am assuming—he testified, Your Honor, concerning all FHA programs. I am just getting down to the site selection criteria applies to all HUD's housing programs.

THE COURT: All right.

BY MR. MURRAY:

Q That is true, is that not correct?

A No, it does not apply to all HUD's housing programs. It applies to four lower income housing programs.

Q And those are the 235, 236, the elderly and—

[184] A Rent supplements and conventional public housing.

Q Okay, but it does apply to those four programs, is that not correct?

A Yes.

Q In the report that you made, I believe, with respect to 235, when was that published?

A June of 1971.

Q June, 1971?

THE COURT: That was when in regard to this?

BY MR. MURRAY:

Q When was the site selection criteria—when did it become effective? Do you know?

A February of this year.

Q Is it not a fact that all homes in the suburbs are available to all persons regardless of race?

A No, it is not a fact. It is a legal theory, but it has not yet been proven to be a fact.

Q Well, if anyone is denied a home based upon a race he has a cause of action under the Civil Rights Act, is that not correct?

A That is correct.

[185] THE COURT: So he must have a right that can be enforced by a court, is that right?

THE WITNESS: That is true. He can also complain to the Department of Housing and Urban Development, but our investigations, Your Honor, show that it was not a fact with respect to the 235 program. Secretary Romney conceded at Commission hearings that it was not a fact with respect to the general housing market.

MR. MURRAY: I am going to move to strike the answer to that question as not being responsive to my question, Your Honor.

THE COURT: I am going to let it stand.

MR. MURRAY: Your Honor, at this time, based upon my cross examination testimony of this witness, I move that the direct testimony and cross examination be stricken as irrelevant and immaterial to the issues.

THE COURT: The direct-cross examination?

MR. MURRAY: The direct and my cross as being—you allowed me to—

THE COURT: I understand.

MR. MURRAY: I move that that be stricken.

THE COURT: It will be stricken insofar as [186] it applies to FHA programs.

MR. POLIKOFF: Your Honor, may the testimony stand as an offer of proof?

THE COURT: It may stand as an offer of proof.

You are through with the witness?

MR. MURRAY: Yes, Your Honor.

THE COURT: Mr. O'Brien, do you have some?

MR. O'BRIEN: No, sir.

MR. POLIKOFF: I have one question, Your Honor.

REDIRECT EXAMINATION

BY MR. POLIKOFF:

Q You were asked about the limitation of the federal role in the public housing programs to funding, and you began to answer but didn't complete your answer; could you explain in what respects that role goes beyond funding?

A It goes well beyond funding to approval of every step of the process by which public housing is ultimately

produced, including tenant assignment policies of the local housing authority and site selection policies of the local housing authorities. HUD has the power to approve or disapprove of those [187] policies and others.

MR. POLIKOFF: No further questions, Your Honor.

THE COURT: You may step down.

(Witness was excused.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

EXCERPT FOR THE TRANSCRIPT OF
NOVEMBER 29, 1972

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[368] THE COURT: All right, that is what you are supposed to do in a closing argument.

MR. POLIKOFF: Professor Hauser's testimony, he was the first witness, there is a lot of population statistics that he produced into the record, but only one of them that I think we need to focus on. He said that before the year 2000, which is only 27 years away, less than one human generation, within all of our lifetimes, I hope,—

THE COURT: Thank you.

MR. POLIKOFF: Well, over 100 per cent of the census tracts, all the census tracts in the City of Chicago will be more than 30 per cent black. He took no account, when he said that, of the buffer zone; so that some indeterminate time sooner than that there is not going to be any general public housing area left in the City of Chicago. And that means, Your Honor, since your existing order is based fundamentally upon—there is no other foundation for it but the distinction between the general and the limited public housing area in Chicago—that as a practical matter, unless something is done—you remember that Professor Hauser didn't say that this was inevitable, on the contrary, he [369] expressed an optimistic opinion that this forecast could be, might be prevented from turning into a dire reality, but unless something is done it means that relief is not going to be possible within this case in our lifetime within the City of Chicago. As a practical matter, there isn't going to be any general public housing area left upon which the order can operate.

We can push, and we will, to get the 1,500 units that are in the pipeline built in the right places and in the right ways.

THE COURT: Is there any money to build them?

MR. POLIKOFF: Oh, no, Your Honor, the 1,500 are provided for from prior fiscal years, at least that is my understanding. If there is any doubt, Mr. Sabella is still here and can confirm it.

I think the 300 are new allocations in addition to the 1,500 that are—

THE COURT: Funds are going to be available for the 1,500 if we ever get 1,500 sites.

MR. POLIKOFF: That is my understanding of what HUD has consistently said in the past, that is right.

• • • •

[375] MR. POLIKOFF: Exhibit 11 gives some indication, Your Honor. Exhibit 11 is the—let me hand the exhibit to you as I refer to it, and get myself a—no, I don't think I need another copy—no, I think I do.

Exhibit 11 shows—let's take a look just at the first page, Cook County, it shows that all of the projects in Cook County are in what would be the limited public housing area, if they were in Chicago, and if you will look for a moment at the statistics, you will see that the first listed project in a census is in a census tract that is 87 per cent black. Fifteen out of fifteen occupants are black.

The second one is in a census tract 87 per cent black, 37 out of 37 occupants black.

The third one in an area that is thirty-three and a third per cent black, that would be limited public housing area in Chicago, 35 out of 35 black occupants.

The next one, 94 per cent, the next one 87 per cent census tract black, 79, 79, 79, 94— [376] and look at the occupancy figures, 117 black out of 120, 99 black out of 100, 110 black out of 116, 99 out of—

THE COURT: I am surprised, and I have gone through East Chicago Heights on many occasions, that they found one white in East Chicago Heights.

MR. POLIKOFF: They did, apparently.

THE COURT: And that they found five for East Chicago Heights, 11 in Berkeley. I think East Chicago Heights is the same percentage black as Ivory soap used

to advertise itself as 99.44/100ths per cent black. Ivory soap is supposed to be 99.44/100ths per cent pure.

MR. POLIKOFF: Well, the precise figure on East Chicago Heights, according to HUD Exhibit B is 97 per cent. It is even better than—

THE COURT: It isn't quite as pure as Ivory soap used to be.

MR. POLIKOFF: Not quite as pure as Ivory soap.

THE COURT: All right.

MR. POLIKOFF: And that is the point, Your Honor, these communities know that if they respond favorably to CHA they can in the future limit these housing projects to these all black areas; just as you have prohibited CHA from limiting them to all black areas [377] in Chicago, if CHA tries to go out into the suburbs, they similarly have to be in white areas as well as black, under your order, and these communties obviously have followed the pattern—

THE COURT: You are going to have a great deal of difficulty in finding some black areas in some of the suburbs.

MR. POLIKOFF: But the suburban areas are predominantly white as a whole, as Your Honor knows. The statistics that Professor Hauser testified to showed that. So that what has happened here is that the relatively few black pockets in the suburbs, East Chicago Heights —

THE COURT: Robbins?

MR. POLIKOFF: And Robbins is another one that is listed here. The figure for Robbins is—

THE COURT: Sections of Evanston.

MR. POLIKOFF: —98 per cent.

Evanston is a different pattern slightly, although it is one of the largest in its black population, the figure for Evanston is 16 per cent black. The—what other ones are listed here—well, the pattern, I am sure Your Honor understands and is familiar with.

The suburban area is predominantly [378] white. There are a few pockets of blacks, East Chicago Heights and Robbins being good illustrations.

For 20 years the only projects that have been put into those areas had been put into those selected black areas. The pattern duplicates the pattern you found to exist in the City of Chicago, where for 20 years the projects were similarly put exclusively in the black areas. And that, as I think you know, is why we cannot expect cooperation from the suburban areas when CHA writes to them and asks them to enter into a plan for putting those 500 units, or some other number, out into the suburban area.

THE COURT: Has is ever occurred to you, Mr. Polikoff, that some suburban areas welcome all who are economically able to live in those suburbs regardless of their color?

MR. POLIKOFF: This is not a question of what individual people in suburban areas may do, and it is not a question, as Your Honor has intimated before, of economics.

The indication from this exhibit is that the housing authorities have limited the location of the projects to the black areas. There are many, many white areas out in suburbia equally poor with [379] the black areas, the census statistics show that. They don't have the housing projects. Why not? Your Honor can draw the inference. This is not—

THE COURT: I can draw another inference: You are aware, of course, that the income, the local taxes on housing areas is minimal compared to those that are not local housing areas that are taxpayer owned, and they are struggling to maintain the facilities that are available for the number of people who live there and who are able to pay their taxes, but you propose to move in those that wouldn't be paying any taxes, giving a village without any additional income additional responsibilities for additional people.

MR. POLIKOFF: Two observations with respect to that, Your Honor: First one is, that as you said in your opinion of February of 1969, and as the law generally makes clear, the pursuit of benign non-racial objections or concerns, if it has the effect of discriminating or preventing the Court from remedying the discrimination does

not reduce the impact of that discrimination or make it any the less amenable to judicial process.

THE COURT: Well, I am talking about all low income housing, white or black, and as I recall the [380] last—

MR. POLIKOFF: I understand that. I am saying that assuming that the sole reason for non-cooperation with CHA is the perception that it would be physically unwise to let them come in, if that is the only reason, if the operation of that—

THE COURT: Let's not call it racial necessarily, because as I recall it, the last figures that are available, the waiting list was three to one white.

MR. POLIKOFF: I am coming to that point, too, Your Honor.

The effect, as you found in 1969—

THE COURT: You may call it economical, but let's get away from that figure "racial".

MR. POLIKOFF: The effect of what you found—well, I hope you don't misunderstand my posture here.

I think on this question we are on the same side of the fence. I am saying that—and I think you said in 1969 that the effect of the policy in Chicago was double, not single. One of the effects was to discriminate against whites, and it discriminated against whites because in effect the policy denied whites housing opportunities because they chose not to live in all black neighborhoods, which was the only option given them, all black neighborhoods and all [381] black projects.

And you can say the same thing about the effects in the suburbs; look at Plaintiffs' Exhibit 11. There is only one project on the front page here that has more than one white, and that is a leasing project in Evanston. Everybody else has got zero white except in Chicago Heights, as you noted, one white family along with 117 black families live in that project.

Now, the effect, whatever the reason and the motivation, taxes or anything else, the effect, as you said in 1969, of this pattern in Cook County, is the same as the effect of that pattern on whites in Chicago. I am not saying that it is a policy that is designed to discriminate on racial grounds in any subjective motivational sense. I don't believe Your Honor understands that any such showing is required. I am going to refer you to a couple of cases—

THE COURT: Of course I agree with you on that, that it is not required.

MR. POLIKOFF: And if it is not required, then we see the discrimination here in effect that you were talking about against whites and not blacks, and not because anybody out there has got it in for [382] poor whites and wants to deny them housing opportunities, but because the result of the operation of the factors that have produced this policy has been to deny whites in the suburbs low income housing opportunities.

It has also been—the second effect you mentioned in 1969—it has also been to deny blacks low income housing opportunities in any but non-black neighborhoods, so I am agreeing with you that there is that double discrimination.

I also want to add a footnote, and that is this fiscal point about no taxes is overdone. CHA's 1971 annual report, which is in the record of this case, CHA has filed it with one of it's quarterly reports to you, says, and I am quoting. "The CHA receives no tax funds from the City of Chicago. Development funds are obtained in the private market. Temporary financing is provided by short term notes," and it goes on to say where those come from. "CHA receives federal funds to meet service costs on 40 year bonds," the ones that Mr. Sabello was testifying about.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed January 29, 1973]

[Title Omitted in Printing]

MOTION

NOW COME plaintiffs, by their attorneys, and move the Court to enter an order,

(1) Deferring ruling on the proposed final judgment orders filed on April 26, 1972, by HUD and on September 25, 1972, by plaintiffs;
(2) Determining that it is necessary and appropriate for the Court to consider a metropolitan plan for relief in this cause; and
(3) Providing for the preparation of such plans by HUD and CHA so that there will be no unnecessary delay in the implementation of the ultimate orders entered by the Court.

A proposed form of such order is attached hereto and a memorandum in support of this motion is tendered herewith.

Respectfully submitted,

/s/ Alexander Polikoff
ALEXANDER POLIKOFF
One of the Attorneys
for Plaintiffs

January 29, 1973

Alexander Polikoff
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed January 29, 1973]

[Title Omitted in Printing]

PROPOSED ORDER

This matter coming on to be heard on the proposed judgment order and related documents filed on April 26, 1972, by defendant George W. Romney, Secretary of the Department of Housing and Urban Development ("HUD"); on the proposed judgment order and related documents filed on September 25, 1972, by plaintiffs; on evidence heard in this cause on November 27-29; 1972; and on plaintiffs' motion filed on January 29, 1973, for a ruling on the propriety of considering metropolitan relief; and,

The Court having heard the presentations of the parties, considered the evidence and being fully advised, the Court now makes the following findings of fact, reaches the following conclusions of law, and enters the following orders:

Findings of Fact

1. According to the United States Census ("Census") for 1970, 32.7% of the population of the City of Chicago was Black in that year. (Tr. 85.)

2. According to the 1960 and 1970 Censuses, within the decade from 1960 to 1970 the Black population of the City of Chicago increased by 35% while the White population diminished by 18%. (Tr. 136 of September 28, 1972.)

3. According to the 1950 Census, 13.6% of the population of the City of Chicago was Black in that year. (Tr. 85.)

4. Assuming that the rate of changes in Black and White population, respectively, during the decade from 1960 to 1970 in Chicago continue, by 1984 the population of the City of Chicago will be over 50% Black, by 1990 58% Black, and by the end of the century 70% Black. (Tr. 86.)

5. According to the 1970 Census the student population of the public schools of the City of Chicago was over 56% Black in that year while less than 1/3 of the general population was Black. (Tr. 87.) The proportion of Blacks in the public school population is much greater than the proportion of Blacks in the general population of the City of Chicago because a higher proportion of White families are elderly, childless or have children enrolled in non-public schools. (Tr. 87.)

6. According to Census figures the percent of census tracts in the City of Chicago having 30% or more Black population was 23.1% in 1960 and 34% in 1970.

7. Assuming that the rate of changes in Black and White population of census tracts, respectively, during the decade from 1960 to 1970 in Chicago continue, by 1990 74% of the census tracts in Chicago will be 30 percent or more Black, and well before 2000 every census tract in Chicago will have at least a 30% Black population. (Tr. 88-89.)

8. Based on such assumptions, there will be no General Public Housing Area (as defined in this Court's judgment order of July 1, 1969) in the City of Chicago at some date well before the year 2000. (Tr. 88-89.)

9. According to the 1970 Census, Blacks comprise about 17% of the population of the Chicago Metropolitan area. (Tr. 95.)

Conclusions of Law

1. The Court has not merely the power but also the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past site selection procedures of CHA and HUD. *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965).

2. In this case the Court's duty will not be discharged by a decree which prohibits continued use of discriminatory site selection procedures in the future; the Court has a duty to eliminate the discriminatory effects of the past employment of such procedures insofar as that is possible.

3. In performing such remedial duty the Court is obligated to take such action as will achieve "the greatest

possible degree of desegregation, taking into account the practicalities of the situation," *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 37 (1971), and the Court "may and should consider the use of all available techniques." *Davis* v. *Board of School Comm'rs.*, 402 U.S. 33, 37 (1971).

4. The scope of the Court's equitable powers to remedy past wrongs is broad, notwithstanding that the necessary remedies may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some. *Swann, supra*, 402 U.S. at 28.

5. The vitality of these remedial principles is not sapped because granting full relief would take a long time or require further litigation. The Court's duty is to eliminate the past effects of the discriminatory site selection procedures insofar as possible, "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

6. Although the factual situations differ among school, housing, anti-trust and other categories of cases, these constitutional remedial principles apply generally. Relief must be directed to that which is necessary and appropriate in the public interest to "*eliminate the effects*" of illegal conduct. *Ford Motor Co.* v. *United States*, 405 U.S. 562, 573, n. 8 (1972) (emphasis in original). The Court's duty is to compel wrongdoers to act in a manner that will, so far as practicable, cure the ill-effects of illegal conduct, and such action is not limited to prohibition of the proven means by which the evil was accomplished. *United States* v. *United Gypsum Co.*, 340 U.S. 76, 88-9 (1950).

7. In the circumstances of this case, particularly the circumstance that the General Public Housing Area in the City of Chicago (as defined in this Court's judgment order of July 1, 1969) will cease to exist at some time well short of the next 27 years, it is not possible for the Court to perform its remedial duty solely within the geographic limits of the City of Chicago. This is one of the "practicalities of the situation" that the Court is obligated to take into account. *Swann, supra*, 402 U.S. at 37.

8. Under such circumstances, the Court has the power and the duty to consider a metropolitan remedy for re-

lief in this case. Local political boundary lines are matters of convenience, not sovereignty, and the Court has the power to bridge such boundary lines where necessary to perform its duty to remedy the past effects of federal constitutional wrongs. *Reynolds* v. *Simms*, 377 U.S. 533, 575 (1964); *Haney* v. *County Board of Education of Sevier County*, 410 F.2d 920, 924-25 (8th Cir. 1969); *Jenkins* v. *Township of Morris School District*, 279 A.2d 619, 628 (S.Ct. N.J. 1971).

9. The affirmative obligation to seek means of disestablishing state-imposed housing segregation must be shared by all agencies or agents of the state who are charged by law with, and who exercise, official housing functions. *Franklin* v. *Quitman County Bd. of Educ.*, 288 F.Supp. 509, 519 (N.D. Miss. 1968). Accord: *Lee* v. *Macon County Bd. of Educ.*, 267 F.Supp. 458, 478-49 (M.D. Ala. 1967) (three judge court), aff'd. sub nom. *Wallace* v. *United States*, 389 U.S. 215 (1967); *United States* v. *Texas*, 321 F.Supp. 1043, 1056-1057 (E.D. Tex. 1970), 330 F. Supp. 235 (E.D. Texas 1971), modified and aff'd, 447 F.2d 441 (5th Cir. 1971).

10. The fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by fragmentation of decision making. The United States Constitution recognizes no governing unit except the federal government and the state. *Hall* v. *St. Helena Parish School Bd.*, 197 F.Supp. 649, 658 (E.D. La. 1961) (three judge court), aff'd, 368 U.S. 515 (1962).

11. The Court is not now called upon to decide whether to order a metropolitan remedy in this case; the Court is only called upon to decide at this time whether it has the power and the duty to consider such a remedy. However, the Court notes that all parties to this case have conceded, at least in principle, that a metropolitan remedy is desirable. (E.g., as to HUD, Tr. 4, 6-7, February 22, 1972; as to CHA, Memorandum of December 21, 1971, p. 27.)

WHEREFORE, IT IS HEREBY ORDERED:

(1) The Court hereby determines that it is necessary and appropriate to consider a metropolitan plan to remedy

the past effects of the unconstitutional site selection procedures employed by CHA and approved and funded by HUD.

(2) The Court will keep under advisement the proposed judgment orders of the parties previously filed and will defer a ruling thereon at this time.

(3) Within 45 days from the date hereof HUD and CHA shall, separately or together, file with the Court and serve upon counsel for plaintiffs their recommendations for comprehensive metropolitan-wide relief in this case, including a form of proposed judgment order or orders designed to provide such relief. Such recommendations shall also include a designation of such additional parties, if any, as in the opinion of HUD or CHA, as the case may be, should be joined as additional parties to the action to make the proposed relief effective. In the case of HUD such recommendations shall include such consideration of programs other than the conventional public housing program as in HUD's judgment may appropriately be employed to effect full relief in this case.

(4) The Court is of the opinion that paragraph (1) of the ordering portion of this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from such portion of this order may materially advance the ultimate termination of this litigation, all as provided in 28 U.S.C. § 1292(b).

ENTER:

[Not signed]
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title Omitted in Printing]

[Filed September 30, 1974]

REPORT NO. 14 TO THE COURT
PURSUANT TO ORDER OF APRIL 16, 1971

CHA ACTIVITIES—
FAMILY PUBLIC HOUSING SITES

1. Project ILL-2-85

It was stated in Report No. 13 that the construction of 63 units in the original Project ILL-2-85 have been assigned Project Nos. ILL-2-90, 91, 93 and 94. Four separate construction contracts were awarded to Teddy Bear Builders (2), Ruby Construction Co. and M. L. Peterson for this work. These contract awards have now been approved by the Area Office of the Department of Housing and Urban Development and Notice to Proceed issued by the Chicago Housing Authority. Actual construction has been started on these contracts. The Area Office of the Department of Housing and Urban Development has completed the Special Environmental Clearance for the 56 substitute sites submitted for the residual units in the ILL-2-85 Program. Thirty-eight (38) sites were approved and an additional 11 sites are under further study. (Copy of letter from HUD, dated August 23, 1974, attached as "Exhibit A.")

2. Projects ILL-2-86 and ILL-2-87

Development Programs have been submitted to the Area Office of the Department of Housing and Urban Development but have not been approved. Forty-nine (49) sites representing 170 units have been submitted for environmental clearance. Chicago Housing Authority, at the present time, has no funding for these programs.

3. Section 23—Leasing Program and Section 8 of Housand Community Development Act of 1974

In conformance with the Department of Housing and Urban Development's requirement that prior to the submission of an application for revised Section 23 Housing Assistance Payments Program the Local Authority must meet with the Department of Housing and Urban Development in a pre-application conference, the Chicago Housing Authority met with officials of the Area Office, Department of Housing and Urban Development, on July 17, 1974. At this conference Chicago Housing Authority was advised that present policy will not permit the assigning of additional units to any Local Housing Authority that is not 100% leased. Chicago Housing Authority is now advised that there are 450 units available in the Section 23 Program. Accordingly, Chicago Housing Authority, by its letter of September 10, 1974 to the Director, Area Office of the Department of Housing and Urban Development, has requested that the Area Office of the Department of Housing and Urban Development waive the 100% occupancy policy and permit Chicago Housing Authority to submit its application. Under joint memorandum issued on August 22, 1974 by Sheldon B. Lubar, Assistant Secretary-Commissioner, Housing Production and Mortgage Credit, and H. R. Crawford, Assistant Secretary for Housing Management, new construction and substantial rehabilitation application and projects would be subject to the provisions of Section 8 of the Housing and Community Development Act. It is anticipated that specific regulations under Section 8 of this Act will be published on or about October 1, 1974. As soon as procedures are established, Chicago Housing Authority will submit an application for both existing and new construction provided under the Housing and Community Development Act of 1974.

CHA ACTIVITIES—INFORMING THE PUBLIC RE THE NEW PUBLIC HOUSING PROGRAM

No new developments since Report No. 10, dated September 30, 1974.

CHA ACTIVITIES—AGREEMENT WITH HOUSING AUTHORITY OF COOK COUNTY

No new developments since Report No. 8, dated March 30, 1973.

Respectfully submitted,

/s/ Harry J. Schneider
HARRY J. SCHNEIDER
Executive Director

September 30, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed February 25, 1975]

[Title Omitted in Printing]

ORDER

This matter coming on to be heard on the motion of plaintiffs to add parties defendant and to file a supplemental complaint, and the Court having heard the presentations of the parties and being fully advised,

IT IS HEREBY ORDERED:

1. The Housing Authority of Cook County, DuPage County Housing Authority, Housing Authority of the County of Lake, Housing Authority of the County of McHenry, Housing Authority of the Village of Oak Park, Maywood Housing Authority, Waukegan Housing Authority, Housing Authority of North Chicago, Aurora Land Clearance Commission, Housing Authority of Elgin, Housing Authority of Joliet, Illinois Housing Development Authority, Northeastern Illinois Planning Commission and Frank A. Kirk, as Director of the Department of Local Government Affairs of the State of Illinois, be and they hereby are made parties defendant in this consolidated cause;

2. Leave is hereby granted to plaintiffs to file instanter the supplemental complaint referred to in said motion of plaintiffs;

3. Defendants Chicago Housing Authority and James T. Lynn shall answer or otherwise plead to the supplemental complaint on or before March 26, 1975, and the newly added defendants shall answer or otherwise plead to the supplemental complaint within the time provided in Rule 12(a) of the Federal Rules of Civil Procedure; and

4. Plaintiffs shall cause copies of the supplemental complaint and this order to be served as promptly as pos-

sible upon the newly added defendants in the manner provided in Rule 4 of the Federal Rules of Civil Procedure.

ENTER:

/s/ R. B. Austin
R. B. AUSTIN
Judge

Date: February 24, 1975

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

[Filed February 25, 1975]

No. 66 C 1459
66 C 1460

(Consolidated)

DOROTHY GAUTREAUX, ET AL., PLAINTIFFS

v.

CHICAGO HOUSING AUTHORITY, a corporation, HARRY B. SCHNEIDER, Executive Director, Chicago Housing Authority, JAMES T. LYNN, Secretary, Department of Housing and Urban Development, HOUSING AUTHORITY OF COOK COUNTY, a corporation, DUPAGE COUNTY HOUSING AUTHORITY, a corporation, HOUSING AUTHORITY OF THE COUNTY OF LAKE, a corporation, HOUSING AUTHORITY OF THE COUNTY OF MCHENRY, a corporation, HOUSING AUTHORITY OF THE VILLAGE OF OAK PARK, a corporation, MAYWOOD HOUSING AUTHORITY, a corporation, WAUKEGAN HOUSING AUTHORITY, a corporation, HOUSING AUTHORITY OF NORTH CHICAGO, a corporation, AURORA LAND CLEARANCE COMMISSION, a corporation, HOUSING AUTHORITY OF ELGIN, a corporation, HOUSING AUTHORITY OF JOLIET, a corporation, ILLINOIS HOUSING DEVELOPMENT AUTHORITY, a body politic and corporate, NORTHEASTERN ILLINOIS PLANNING COMMISSION, a body politic and corporate, and FRANK A. KIRK, Director of the Department of Local Government Affairs of the State of Illinois, DEFENDANTS

SECOND SUPPLEMENTAL COMPLAINT

NOW COME PLAINTIFFS, by their attorneys, and for their second supplemental complaint state as follows:

1. Each of defendants HOUSING AUTHORITY OF COOK COUNTY, DUPAGE COUNTY HOUSING AUTHORITY, HOUSING AUTHORITY OF THE COUNTY OF LAKE, HOUSING AUTHORITY OF THE COUNTY OF MCHENRY, HOUSING AUTHORITY OF THE VILLAGE OF OAK PARK, MAYWOOD HOUSING AUTHORITY, WAUKEGAN HOUSING AUTHORITY, HOUSING AUTHORITY OF NORTH CHICAGO, AURORA LAND CLEARANCE COMMISSION, HOUSING AUTHORITY OF ELGIN, and HOUSING AUTHORTIY OF JOLIET, is a municipal corporation organized and existing under the laws of the State of Illinois. Together with the defendant CHICAGO HOUSING AUTHORITY, such housing authorities constitute all of the housing authorities organized and existing within the area commonly known as the Chicago Metropolitan Area, being the Chicago Standard Metropolitan Statistical Area, consisting of the Illinois counties of Cook, DuPage, Lake, McHenry, Kane and Will, as such area is defined by the Bureau of the Census.

2. Defendants HOUSING AUTHORITY OF COOK COUNTY, DUPAGE COUNTY HOUSING AUTHORITY, HOUSING AUTHORITY OF THE COUNTY OF LAKE and HOUSING AUTHORITY OF THE COUNTY OF MCHENRY have as their "normal" areas of operation the Counties of Cook, DuPage, Lake and McHenry, Illinois, respectively, exclusive of any city, village or incorporated town within such counties within which another housing authority exists. Defendants HOUSING AUTHORITY OF THE VILLAGE OF OAK PARK and MAYWOOD HOUSING AUTHORITY have as their "normal" areas of operation the cities of Oak Park and Maywood, Illinois, respectively, which cities are located in the County of Cook, Illinois. Defendants WAUKEGAN HOUSING AUTHORITY and NORTH CHICAGO HOUSING AUTHORITY have as their "normal" areas of operation the cities of Waukegan and North Chicago, Illinois, respectively, which cities are located in the County of Lake, Illinois. Defendants AURORA LAND CLEARANCE COMMISSION and HOUSING AUTHORITY OF ELGIN have as their "normal" areas of operation the cities of Aurora and Elgin, Illinois, respectively, which cities are located in the County of Kane, Illinois. Defendant HOUSING AUTHORITY OF JOLIET has as its "normal" area of operation the city of Joliet, Illinois, which city is located in the County of Will, Illinois. In addition to such "normal" areas of operation each of the defendant housing authorities, including the CHICAGO HOUSING AUTHORITY, (i) may exercise any or all of its powers jointly with any other housing authority or authorities for the purpose of financing, planning, undertaking, constructing or operating a housing project or projects located within the "normal" area of operation of any one or more of them, and (ii) may operate outside its "normal" area of operation by contract with another housing authority or, subject to conditions set out in Illinois Revised Statutes, chapter 67½, section 27c, by contract with a public body not within the "normal" area of operation of another housing authority.

3. Defendant ILLINOIS HOUSING DEVELOPMENT AUTHORITY is a body politic and corporate organized and existing under the laws of the State of Illinois.

4. Defendant NORTHEASTERN ILLINOIS PLANNING COMMISSION is a body politic and corporate organized and existing under the laws of the State of Illinois.

5. Defendant FRANK A. KIRK is the Director of the Department of Local Government Affairs of the State of Illinois, an executive agency of the State of Illinois.

6. On August 26, 1974, the United States Court of Appeals for the Seventh Circuit issued its opinion in Nos. 74-1048 and 74-1049, being appeals from orders entered in this case. On September 30, 1974, the Court of Appeals entered an order denying a petition for rehearing respecting said appeals. On or about October 8. 1974, the Court of Appeals issued its mandate respecting said appeals and the same was delivered to the Clerk of this Court.

7. Among other things, said opinion of the Court of Appeals and order denying rehearing determine and provide:

(a) It is necessary and equitable that a remedial plan to be effective in this consolidated case must be on a suburban or metropolitan area basis (slip opinion of August 26, 1974, p. 10);

(b) This Court's order of September 11, 1973, is remanded for additional evidence and further consideration in light of said opinion and order of the Court of Appeals and of the opinion of the Supreme Court of the United States in *Milliken* v. *Bradley*, —— U.S. ——, to wit: the adoption of a comprehensive meteropolitan area plan to disestablish and remedy the effects of the segregated public housing system in Chicago by increasing the supply of dwelling units as rapidly as possible (*id.* at 15; order on rehearing, p. 2); and

(c) The validity of any specific metropolitan area plan is left for this Court to consider upon remand. (Slip Opinion of August 26, 1974; p. 10)

8. As this Court has previously determined (*Gautreaux* v. *Chicago Housing Authority*, 342 F.Supp. 827, at 829), all agencies and agents of the State of Illinois possessing housing powers share an affirmative obligation to assist in remedying the effects of the segregated public housing system in Chicago except to the extent compelling governmental interests precludes such assistance. Each of the defendants newly added as such by this Second Supplemental Complaint possesses such housing powers as follows:

(a) Under the laws of the State of Illinois each of the defendant housing authorities has the power and the duty, among others, to engage in low rent housing projects, which activity is declared by such laws to be a governmental function essential to the public interest.

(b) Under the laws of the State of Illinois the defendant ILLINOIS HOUSING DEVELOPMENT AUTHORITY has the power and the duty, among others, to assist in the planning and development of

housing for low-income persons throughout the State of Illinois. To that end various powers are conferred upon the Development Authority by the provisions of Illinois Revised Statutes, chapter 67½, section 301 et seq., and other Illinois laws.

(c) Under the laws of the State of Illinois the defendant NORTHEASTERN ILLINOIS PLANNING COMMISSION has the power and the duty, among others, to assist in planning, including planning for housing, for the Chicago Metropolitan Area, as such area is defined by the Bureau of the Census. To that end various powers are conferred upon the Planning Commission by the provisions of Illinois Revised Statutes, chapter 85, section 1101 et seq., and other Illinois laws.

(d) Under the laws of the State of Illinois defendant KIRK, as Director of the Department of Local Government Affairs, exercises supervisory powers over housing authorities organized and existing under the laws of the State of Illinois and has the power and the duty, among others, to assist in the planning and development of housing for low-income persons throughout the State of Illinois. To that end various powers are conferred upon the Department by the provisions of Illinois Revised Statutes, Chapter 127, section 63b14 et seq., and other Illinois laws.

There is no compelling governmental interest which dictates that any of such newly added defendants should not participate in carrying out and implementing the judgment orders of the Court heretofore entered in this consolidated cause and in the development and implementation of a comprehensive metropolitan area plan, for the adoption of which the U.S. Court of Appeals for the Seventh Circuit ordered a remand to this Court, as hereinabove alleged.

9. On April 11, 1968, Public Law 90-284 was signed into law by the President of the United States. Under the provisions thereof, particularly Sections 801 and 808 thereof, 42 U.S.C.A. §§ 3601, 3608, under the remand

ordered by the Court of Appeals for the Seventh Circuit as hereinabove alleged, and by reason of the conduct, previously determined in this consolidated cause to be unlawful, of the predecessors in office of defendant JAMES T. LYNN, said defendant LYNN, as Secretary of the Department of Housing and Urban Development, has a duty to participate in carrying out and implementing the judgment orders of the Court heretofore entered in this consolidated cause and in the development and implementation of a comprehensive metropolitan area plan, for the adoption of which said remand to this Court was ordered.

10. On August 22, 1974, the Housing and Community Development Act of 1974, Public Law 93-383 (the "Act") was signed into law by the President of the United States. Among other things, the Act continues in effect previously established public housing programs and establishes a new lower-income housing assistance program. The purpose of such new program is "aiding lower-income families in obtaining a decent place to live and . . . promoting economically mixed housing," and for such purpose so-called "assistance payments" are authorized to be made with respect to existing, newly constructed and substantially rehabilitated housing in which some or all of the units shall be available for occupancy by lower-income families. Pursuant to annual contributions contracts between the Secretary and public housing agencies, such agencies may also make assistance payments to owners of existing housing in which some or all of the units shall be available for occupancy by lower-income families. As defined in the Act, "public housing agency" includes the defendant ILLINOIS HOUSING DEVELOPMENT AUTHORITY, the Department of Local Government Affairs of the State of Illinois and the defendant housing authorities, and "lower-income families" includes members of the plaintiff class.

WHEREFORE, plaintiffs pray:

(a) For the entry of a declaratory judgment that there is no compelling governmental reason why the defendants newly added as such by this Second Supplemental Complaint should not participate in carrying out and implementing the judgment orders of the Court heretofore entered in this consolidated cause and in the development and implementation of a comprehensive metropolitan area plan to disestablish and remedy the effects of the segregated public housing system in Chicago by increasing the supply of dwelling units as rapidly as possible.

(b) For the entry of an order directing the defendant NORTHEASTERN ILLINOIS PLANNING COMMISSION to prepare such a comprehensive metropolitan area plan in cooperation with such of the other defendants as may desire to participate in such preparation, utilizing the lower-income housing assistance program established by Public Law 93-383 as well as previously established public housing programs, and submit the same for the Court's consideration within such period as the Court may designate.

(c) Following the Court's adoption of a comprehensive metropolitan area plan, for the entry of an order directing the appropriate defendants to implement the same as rapidly as possible; and

(d) For the entry of an order granting plaintiffs such other and further relief as the Court may deem just and equitable.

ALEXANDER POLIKOFF
MILTON I. SHADUR
BERNARD WEISBERG
CECIL C. BUTLER
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Attorneys for Plaintiffs

By: /s/ Alexander Polikoff
ALEXANDER POLIKOFF

February 5, 1975

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed May 6, 1975]

[Title Omitted in Printing]

RECOMMENDATION OF MASTER

In the proceedings being conducted pursuant to the Memorandum Opinion and Reference Order of the Honorable Richard B. Austin, dated November 7, 1974, the plaintiffs have appeared before me by counsel and requested that I recommend the entry of an order in the form attached hereto. The representations advanced in support of plaintiffs' request are contained in the report of the proceedings held before me this day. The Department of Housing and Urban Development has represented to me by counsel that it does not object to the entry of the proposed order; The Chicago Housing Authority has stated its objection for the record.

Wherefore, being of the opinion that the entry of the proposed order would further the objectives of the judgment orders previously entered in this consolidated case, I do hereby recommend that an order in the form attached hereto be entered by the District Court. The foregoing is an interim recommendation only and is not the final Report of the Special Master called for by the reference order of November 7, 1974.

Respectfully submitted.

/s/ Olga Jurco
Magistrate, United States
District Court

Dated: May 5, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

[Filed May 8, 1975]

[Title Omitted in Printing]

ORDER

This matter coming on to be heard on the recommendations of the Master to whom this matter has previously been referred for the entry of a proposed order, and

The Court having determined that the proposed order is appropriate and in furtherance of the purposes of the judgment orders previously entered in this consolidated cause,

IT IS HEREBY ORDERED;

(1) The judgment order entered herein on September 11, 1973, which directs the defendants, Department of Housing and Urban Development ("HUD") to use its best efforts to cooperate with the Chicago Housing Authority to increase the supply of low-rent public housing in accordance with laws, applicable regulations and the judgment order entered herein on July 1, 1969, as amended, shall not be interpreted to preclude the defendant Housing and Urban Development from approving a Housing Assistance Plan filed with it by the City of Chicago pursuant to the Housing and Community Development Act of 1974 if such Plan provides that,

(a) Not less than 60% of the funds made available by HUD for annual contributions contracts and housing assistance payments contracts for use in the City of Chicago pursuant to Section 8 of Section 201(a) of the Housing and Community Development Act of 1974 shall be allocated for non-elderly housing;

(b) Not less than 60% of the housing units provided by the funds allocated under paragraph (a) preceding (whether newly constructed, substantially rehabilitated or existing) shall be physically located within the General Public Housing Area as defined in the Court's judgment order of July 1, 1969, as amended, and shall conform to the provisions of Article III.C, D and E and Article IV of said judgment order (except that 60% shall replace 75% in Article III.C and D and Article III.B shall not apply) as though they were Dwelling Units thereunder and had been or were to be made available by or through the Chicago Housing Authority; and

(c) Not less than 50% of the housing units allocated under paragraph (b) preceding shall be made available for occupancy by members of the plaintiff class in accordance with orders previously entered herein.

(2) Except as and to the extent specifically provided in this order, this Court's judgment orders previously entered herein, as previously modified, remain in full force and effect.

(3) This Court retains jurisdiction of this matter for all purposes, including enforcement and the issuance, upon proper notice and motion, of orders modifying or supplementing the terms of this order upon the presentation of relevant information with respect to proposed housing developments designed to achieve results consistent with judgment orders previously entered herein, material changes in conditions existing at the time of this order or any other matter.

ENTER:

/s/ Richard B. Austin
Judge,
United States District Court

Dated: May 5, 1975

SUPREME COURT OF THE UNITED STATES

No. 74-1047

CARLA A. HILLS, Secretary of Housing and Urban Development, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

ORDER ALLOWING CERTIORARI Filed May 12, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 594998 75

Supreme Court, U. S.
FILED
MAR 26 1975

No. 74-1047

In the

Supreme Court of the United States

OCTOBER TERM, 1974

JAMES L. MITCHELL, ACTING SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Petitioner,

vs.

DOROTHY GAUTREAUX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

PAGE

QUESTIONS PRESENTED 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT 2

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. The Decision Below Does Not Conflict with *Milliken* 10

A. No Inter-District Remedy is Involved as to HUD 11

B. There is Evidence Here of Constitutional Violations by HUD in the Suburban as well as the Central City Portion of the Housing Market Area 20

C. Factors Decisive in *Milliken* are Not Present Here 22

II. The Decision Below Will Not Hamper Implementation of Federal Programs 32

III. Review Now Would be Premature 34

CONCLUSION 36

Table Of Citations

Cases

Brotherhood of L.F.&E. v. Bangor & A.R.C., 389 U.S. 327 (1967) 35

Brown v. Board of Education, 349 U.S. 294 (1955) 35

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1963) 3

Cohens v. Virginia, 19 U.S. 264 (1821) 23

PAGE

Davis v. Board of School Commissioners, 402 U.S. 33 (1971) 36

Franklin v. Quitman County Board of Education, 288 F. Supp. 509 (N.D. Miss. 1968) 26

Gautreaux v. CHA, 296 F. Supp. 907 (N.D. Ill. 1969) .. 3

Gautreaux v. CHA, 304 F. Supp. 736 (N.D. Ill. 1969) .. 3

Gautreaux v. City of Chicago, 342 F. Supp. 827 (N.D. Ill. 1972) 3, 25

Gautreaux v. CHA, 384 F. Supp. 37 (N.D. Ill. 1974) 3

Gautreaux v. CHA, 436 F. 2d 306 (CA 7, 1970), cert. denied 402 U.S. 922 (1971) 3

Gautreaux v. City of Chicago, 480 F. 2d 210 (CA 7, 1973), cert. denied 414 U.S. 1144 (1974) 3, 25, 31, 32

Gautreaux v. CHA, 503 F. 2d 930 (CA 7, 1974) 3, 7, 8

Gautreaux v. CHA, ... F. 2d ..... (CA 7, January 24, 1975) 3

Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971) 3

Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973) 3

Gautreaux v. Romney, 448 F. 2d 731 (CA 7, 1971) 2, 3, 13

Gautreaux v. Romney, 457 F. 2d 124 (CA 7, 1972) 3

Goss v. Board of Education, 373 U.S. 683 (1963) 36

Green v. School Board of New Kent County, 391 U.S. 430 (1968) 35, 36

Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251 (1916) 35

Housing Authority of City of Omaha v. United States Housing Authority, 468 F. 2d 1 (CA 8, 1972) 12

Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) .. 36

PAGE

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973) 21, 22, 27, 28, 29

Lemon v. Kurtzman, 411 U.S. 192 (1973) 23

Louisiana v. United States, 380 U.S. 145 (1965) 3, 29

Milliken v. Bradley, 418 U.S. 717 (1974) 1, 2, 8, 10, 11, 20, 22, 23, 24, 26, 29, 31, 32, 35, 36, 37

Oliver v. Kalamazoo Board of Education, 368 F. Supp. 143 (W.D. Mich. 1973) 21

Shannon v. United States Department of Housing & Urban Development, 436 F. 2d 809 (CA 3, 1970) .. 14

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971) 30, 35, 36

Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969) 14

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 15

United States v. Connecticut National Bank, ... U.S. ....., 41 L. Ed. 2d 1016, 1028 (1974) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 2

STATUTORY PROVISIONS

42 U.S.C. §1401 .....12, 14
42 U.S.C. §1402(2) 15
42 U.S.C. §1409 11
42 U.S.C. §1421b 5, 11, 27
42 U.S.C. §1415(7) 29
42 U.S.C. §1437 .....12, 14
42 U.S.C. §1437a(2) 15
42 U.S.C. §1437f 11, 17, 33
42 U.S.C. §1437f(b)(1) 24, 27

PAGE

42 U.S.C. §1437f(b)(2) 24, 27
42 U.S.C. §1439(c) 29, 33
42 U.S.C. §1441 14
42 U.S.C. §2000d 2, 15
42 U.S.C. §3601 14
42 U.S.C. §3608(d)(5) 15
42 U.S.C. §5301 33
42 U.S.C. §5301(a)(1) 15, 33
42 U.S.C. §5301(c)(6) 15, 34
42 U.S.C. §5304(a)(4)(A) 34
42 U.S.C. §5304(c) 29
Ill. Rev. Stat. ch. 67½, §3 19
Ill. Rev. Stat. ch. 67½, §13 14
Ill. Rev. Stat. ch. 67½, §17b 19
Ill. Rev. Stat. ch. 67½, §27c 19, 25

MISCELLANEOUS AUTHORITIES

37 Federal Register 75 (January 5, 1972) 18
37 Federal Register 203 (January 7, 1972) 17
39 Federal Register 45169, 45173 (December 30, 1974) 18
Stern and Gressman, Supreme Court Practice 180 (4th ed. 1969) 34
Senate Report No. 92-900, 92nd Cong., 2d Session, pp. 121-22 21
House of Representatives Report No. 93-1114, 93rd Cong., 2d Session, p. 7 34
House Document No. 91-292, 91st Cong., 2d Session, U.S. Gov't Printing Office, April 2, 1970, pp. 20-21 .. 15
Department of Housing and Urban Development, Analysis of Chicago, Illinois Standard Metropolitan Statistical Area Housing Market, June 1966 .....4, 16
Department of Housing and Urban Development, Federal Housing Administration Techniques of Housing Market Analysis, January 1970 .....4, 15, 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1047

JAMES L. MITCHELL, ACTING SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Petitioner,

vs.

DOROTHY GAUTREAUX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED

1. Whether *Milliken* v. *Bradley,* 418 U.S. 717 (1974), precludes a federal court from providing relief throughout a housing market area for discrimination carried on within a portion of the same area by the Department of

Housing and Urban Development in violation of both the Fifth Amendment and the Civil Rights Act of 1964.

2. Whether review on certiorari is premature where the judgment of a court of appeals is nonfinal, having remanded the case for additional evidence and for consideration of the issue of housing market area relief in light of the opinions of the court of appeals and of this Court in *Milliken* v. *Bradley*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . *U.S. Const. Amend. V.*
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. *Section 601, Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d.*

STATEMENT

In 1971, reversing a 1970 order of the district court,* the Court of Appeals for the Seventh Circuit held that the Department of Housing and Urban Development ("HUD") had "violated the Due Process Clause of the Fifth Amendment . . . and also has violated Section 601 of the Civil Rights Act of 1964 . . ." *Gautreaux* v. *Romney*, 448 F.2d 731, 740 (CA 7, 1971). The holding was based on the determination that, in conjunction with the Chicago Housing Authority ("CHA"), HUD had exercised its powers in a manner which "perpetuated a racially discriminatory housing system in Chicago." *Id.* at 739. Al-

* The unreported district court decision is reproduced as Appendix A to the petition for certiorari.

though CHA officials were deeply involved in the discrimination and had previously been held separately liable,* the court's holding was not based on the "joint participation" doctrine of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1963); rather, the court said HUD's actions "constituted racially discriminatory conduct in their own right." 448 F.2d at 739.** The case was remanded for appropriate relief to be determined by the district court, the court of appeals having stated that the extent of possible equitable relief, while extremely important, was not before it. *Id.* at 734. In particular, the court expressly declined to state a view as to whether requested relief involving the Chicago metropolitan area was "either necessary or appropriate." *Id.* at 736.

* Cases against CHA and HUD were originally filed simultaneously but separately. Proceedings against HUD were then stayed pending disposition of the suit against CHA. The two cases were later consolidated on HUD's motion. Reported decisions in the other phases of the case are as follows: (1) the original judgment order against CHA and a modification of it—296 F.Supp. 907; 304 F.Supp. 736; 436 F.2d 306, cert. denied, 402 U.S. 922 (1971); (2) an unsuccessful effort to enforce HUD's liability through the Model Cities Program—332 F.Supp. 366; 457 F.2d 124; (3) proceedings setting aside the Chicago City Council's veto power over CHA site selection—342 F.Supp. 827; 480 F.2d 210, cert. denied, 414 U.S. 1144 (1974); and (4) a recent reference to a special master to identify the reasons for delay in implementing earlier orders and to make recommendations—384 F.Supp. 37; ..... F.2d ..... (January 24, 1975).

** This prior determination of HUD's liability is the law of the case and is concededly not now at issue before this Court. (Petition, p. 5, n.4.) Thus, the duty "so far as possible [to] eliminate the discriminatory effects of the past," *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965), is here an independent obligation of HUD.

On remand the parties took the position that the effects of residential segregation were felt throughout the relevant housing market area and that metropolitan relief was therefore the desirable—and probably the only effective—form of relief in the case.* HUD's position was stated succinctly by its then Secretary, George Romney, as follows:

> "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. The City and the suburbs together make up what I call the 'real city.' To solve problems of the 'real city' only metropolitan wide solutions will do." (Statement of then Secretary of HUD, George Romney, Appendix Z, pp. 15-16, to HUD's Memorandum, December 7, 1971, Record Doc. 283, Attachment 6, Memorandum 2, p. 2.)

Subsequently HUD joined the respondents in representing to the district judge that "a metropolitan remedy is desirable." (Transcript of Proceedings, pp. 4, 6, February 22, 1972.)

CHA, which is not a petitioner here, likewise took the position that only a metropolitan remedy would be effective to remedy the effects of segregation in this case.

> "CHA fully agrees that public housing must be metropolitan in nature, and not confined to the City of Chicago. It has so stated on numerous occasions before this court. It has offered testimony that a dispersal program for public housing will not work unless it is operated on a metropolitan basis." (CHA Memorandum, December 21, 1971, Record Doc. 167, p. 27.)

* HUD defines a housing market area as "the geographic entity within which nonfarm dwelling units are in mutual competition." (Department of Housing and Urban Development, Federal Housing Administration Techniques of Housing Market Analysis, January 1970, p. 10.) The Chicago housing market area consists of the six Illinois counties of Cook, DuPage, Kane, Lake, McHenry and Will. (Department of Housing and Urban Development, Analysis of Chicago, Illinois Standard Metropolitan Statistical Area Housing Market, June 1966, p. 1.)

These positions were consistent with positions earlier adopted by each party. In the prior separate proceedings against CHA a partial metropolitan remedy had been included in the initial remedial order. Among other provisions the order authorized a portion of the contemplated remedial housing to be located in the suburban Cook County portion of the housing market area outside Chicago. 304 F.Supp. at 739. (Chicago is located within Cook County.) Pursuant to that authorization CHA contracted with the Housing Authority of Cook County for "housing in areas outside the municipal boundaries of the City of Chicago . . . to house low-income families who are residents of Chicago and who are certified by CHA to be eligible for housing." (Attachment No. 14, p. 1, to CHA Report No. 5, Record Doc. 274.) The contract involved "leased housing" which federal housing laws required to be employed "in a manner calculated to meet the total housing needs of the community in which [dwelling units] are located." 42 U.S.C. §1421b(a) (3). In approving the contract, submitted to it for that purpose, HUD interpreted the statutory term "community" to refer to the Chicago housing market area:

> "[W]e have concluded that Section 23 [42 U.S.C. §1421b] units in a given 'locality' may be used to meet housing needs beyond the political boundaries of the locality . . . [W]hat Congress intended by the term 'community', as used in Section 23(a)(3) [42 U.S.C. §1421b(a) (3)], was not a political subdivision,

as such, but the housing market area in which the housing to be leased is located." (Attachment No. 11 p. 1, to CHA Report No. 5, Rec. Doc. 274.)

In urging the district court to dismiss the action against it (relief that was granted but then reversed by the court of appeals) HUD had contended that the voluntary metropolitan remedial steps it was then taking were all that was required to achieve the desired remedy.* It said that since the entry of the decree in the prior proceedings against CHA, HUD had focused on three objectives: improving the environment for Chicago public housing residents, providing additional federally subsidized housing in Chicago, and providing additional federally subsidized housing in the Chicago suburban area. (Affidavit of Don Morrow, June 8, 1970, p. 1, Record Item 52, Appeal #71-1073.) Respecting the third objective HUD advised the district court as follows:

"Pursuit of the third objective of building in the suburbs has called for a multiplicity of actions. One level of our activity has been to help identify sites for low rent housing . . .

* The argument was made in opposition to plaintiffs' motion for summary judgment against HUD seeking relief relating to "that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago housing market area." (Appendix A to the petition, p. 15a.) HUD's brief included a section captioned, "The Plaintiffs' Objectives will be More Readily Achieved by the Voluntary Efforts of the Defendant (HUD) than by the Coercion of a Judicial Decree." (HUD Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 22, Record Item 52 in Appeal #71-1073, part of the Record in this case.)

The development of the criteria was done in cooperation with the CHA and the Cook County Housing Authority . . .

The Northeastern Illinois Planning Commission has agreed to undertake an identification of the locations within the Chicago metropolitan area where low and moderate income housing should be built . . . using the criteria . . . Added to these criteria will be the special attention urged by HUD to achieving the objective of a racial and economic balance in communities within the region. . .

In the meantime to satisfy an immediate need for housing sites in Cook County, we have indicated to the Cook County Housing Authority that HUD will look favorably on a request for an advance loan to the Authority to identify sites in Cook County suitable for low rent housing. . ." (*Id.* 2-3.)

Nonetheless, in the proceedings on remand following the 1971 court of appeals opinion the district court ultimately denied plaintiffs' motion to consider metropolitan relief and entered a largely non-metropolitan judgment against HUD. 363 F.Supp. 690, 691.* The ruling against considering metropolitan relief was then appealed, whereupon the court of appeals reversed and remanded the case "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in Milliken v. Bradley." *Gautreaux* v. *Chicago Housing Author-*

* The judgment order directed HUD to use its best efforts to cooperate in implementing the remedial order previously entered against CHA. Since, as noted above, that order did include the option to provide some remedial housing in the suburban portion of Cook County, to that extent the judgment against HUD included a limited form of metropolitan relief.

ity, 503 F.2d 930, 940 (CA 7, 1974). The petition for certiorari followed.

SUMMARY OF ARGUMENT

Segregation by the Department of Housing and Urban Development (HUD) here occurred within federal housing programs federally supervised to achieve national housing objectives, among which is the deconcentration of housing opportunities for low income minorities. Because the effects of limiting minority housing opportunities are felt throughout the housing market area in which the limitation occurs, in seeking to achieve the deconcentration objective HUD uses the housing market area as the relevant geographic unit. The appropriate "district" as regards HUD's liability in this case is therefore the Chicago Housing Market Area, and the housing market area relief ordered by the court of appeals is not "inter-district" relief in the *Milliken* v. *Bradley* sense. (Section IA.)

Moreover, unlike the *Milliken* situation, here there is evidence of segregation in the suburban part of the housing market area, not just in the central city. (Section IB.) *Milliken* also does not control here because of the absence of the equitable factors that loomed large in the *Milliken* decision, of any racial balance notion in the decision of the court of appeals in this case, and of any procedural impropriety in approaching the question of metropolitan relief. (Section IC.)

The court of appeals opinion will not hamper the implementation of federal programs; rather, the opinion below is consistent with the policy of the law. (Section II.)

Finally, the practice of this Court not to grant certiorari to review a nonfinal judgment should be followed

here. There is no history of housing desegregation litigation in this Court comparable to the two decades of school desegregation litigation during which the Court has grappled with school desegregation remedies, nor any litigation at all in which the complex federal statutory housing scheme is considered in relation to the obligation of the district court to consider the use of all available techniques to achieve desegregation. A record in which these matters have not been adequately explored—especially where, as here, the range of remedial options open to the district court is considerable—is a treacherous record for deciding issues of far-flung import. (Section III.)

ARGUMENT

The petition for certiorari should be denied because (1) the decision of the Court of Appeals does not conflict with *Milliken* v. *Bradley,* (2) concern that the decision will hamper implementation of federal programs is not well founded, and (3) no remedial plan yet having been prepared, review by this Court now would be premature.

I. The Decision Below Does Not Conflict With Milliken.

The Government reads *Milliken* v. *Bradley* as laying down a firm rule, uniformly applicable in all circumstances "regardless of the presence or absence of administrative problems," that an "inter-district" remedy for segregation may never be justified absent inter-district segregative acts or effects. (Petition pp. 8, 12.) Even on that theory, the Court of Appeals decision in this case is correct and does not conflict with *Milliken* for two independent reasons: (A) no inter-district remedy is involved as to HUD, the sole petitioner in this case (Section A below); and (B) unlike the situation in *Milliken,* here there is evidence of constitutional violations by HUD in the suburban as well as the central city portion of the geographic area proposed to be included in the remedial decree (Section B). But we do not read *Milliken* as does the Government, and we believe that even apart from the two distinctions just noted other factors decisive in *Milliken* and not present here demonstrate that the decision below and *Milliken* are not in conflict (Section C).

A. No Inter-District Remedy is Involved as to HUD.

This case involves segregation occurring within federal housing programs, federally supervised to achieve national housing objectives. In its administration of those programs—particularly respecting the source of its liability in this case, the limitation of minority housing opportunities to areas of existing minority concentration—HUD defines and uses "housing market areas" that are metropolitan in scope and bridge local political boundary lines. Applicable HUD regulations together with numerous HUD statements both within and without this case show that the effects of so limiting minority housing opportunities are felt throughout a housing market area and are not confined to the narrower locality or political jurisdiction in which the limitation occurs. The relevant "district" as regards HUD's liability in this case is therefore the Chicago Housing Market Area. Since that is the area within which the court of appeals opinion requires the effects of HUD's discrimination—within the same area—to be cured, the proposed remedy is not "inter-district" as regards HUD. A brief elaboration will demonstrate that for this reason the decision of the Court of Appeals does not conflict with *Milliken.*

Unlike the *Milliken* situation, the Court is here confronted with segregation that has occurred within federal programs.* The role of local agencies, though important, is subordinate to the ultimate supervision and responsibility of HUD to administer federal housing programs

* The housing programs involved in this case are familiarly called the "conventional," "turnkey," "leased housing" and "housing assistance" programs, respectively, and are established by the United States Housing Act of 1937, as amended. 42 U.S.C. §§1409 et seq., 1421b, 1437f.

to achieve national housing objectives. While maximum responsibility is to be vested in state-created housing agencies (subject, however, to giving "due consideration to accomplishing" and "consistent with" federal objectives, 42 U.S.C. §§1401, 1437), HUD possesses "ultimate supervision and authority in carrying out the objectives of the Housing Act," and "ultimate responsibility for policy . . . to achieve uniformity in fulfilling the objectives of the Act . . ." *Housing Authority of City of Omaha* v. *United States Housing Authority,* 468 F.2d 1, 7 (CA 8, 1972). As the opinion in *Omaha* stated, 468 F.2d at 7-8:

> "Although the congressional mandate given to HUD is that maximum responsibility in the administration of the program should be given to the local authority, we find nothing within the legislative history which precludes HUD's overall supervision and exercise of power where local authorities have failed to measure up to the objectives of the Act."•

• Opposing certiorari in *Omaha,* HUD said that the court of appeals "correctly determined that Section 1401 does not restrict HUD's 'responsibility and concomitant authority to protect and further the purposes and objectives of the Act . . .'" Brief for the Federal Respondents in Opposition to Certiorari, No. 72-793, p. 9.

In its brief in the Eighth Circuit, HUD said that the legislative history of the so-called "local autonomy" amendment demonstrated that Congressional concern "centered around budget control, audits, rents and eligibility requirements," that even in these areas "far less than full control was given to the local housing authorities," that the terms of the statute itself "demonstrate that the local autonomy amendment was not intended to preclude HUD from making rules of broad national policy," and that it was "clear that HUD possesses authority to regulate matters involving broad national policy." HUD's Brief in the Eighth Circuit, Nos. 72-1102 and 72-1185, pp. 25, 19, 21.

Consistent with its "ultimate responsibility," HUD's role in both the administration and financing of federal housing programs is pervasive. For example, at an earlier stage of this case the court of appeals said:

> "[T]here can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. Between 1950 and 1966 alone HUD spent nearly $350,000,000 on CHA projects. The [HUD] Secretary's trial brief acknowledged that 'in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance.' We find no basis in the record with which to disagree with that conclusion. Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's 'Annual Contributions Contract' contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone." *Gautreaux* v. *Romney, supra.,* 448 F.2d at 739.•

• The quotation does not fully reflect the scope and detail of the extensive federal role. For that one must examine HUD's Annual Contributions Contract with local housing agencies such as CHA, virtually every clause of which conditions the local agency's activity on approval by HUD.

Part One of the contract with CHA is 22 single-spaced typewritten pages and deals with a variety of topics. There are, in addition, numerous amendments. Part Two is a 56 page printed booklet (plus a 15 page index) containing ninety-seven different sections, each dealing with a separate subject. These contractual provisions are supplemented by voluminous regulations which HUD issues from time to time, of which the eight pages on site selection are

In recognition of the pervasivesness of the federal role, Illinois law, which otherwise vests in the Illinois Department of Local Government Affairs extensive supervisory powers over local housing agencies, exempts from such powers a housing project financed in whole or in part by the federal government "so long as such project is supervised or controlled by the federal government . . ." Ill.Rev. Stat. ch. 67½, §13.

The national housing objectives which guide and shape HUD's administration of federal housing laws are to be found in a number of statutes which are to be read *in pari materia* with each other. *Shannon* v. *United States Department of Housing and Urban Development*, 436 F.2d 809, 817 (CA 3, 1970).* The most general policy declarations appear in 42 U.S.C. §1441 ("[T]he realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . ." in pursuit of which objectives all agencies having housing powers "shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act . . ."), and 42 U.S.C. §3601 ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States"). It is of course a particular federal objective to remedy the housing shortage for families of low income, 42 U.S.C. §§1401, 1437, that is,

* (Continued)
only one. (The contract is Record Item 20 in Appeal No. 71-1073, and is a part of the Record in this case.) See *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 274-75 (1969).

* *Shannon* briefly reviews how Congress has over the years "refined its view of the factors relevant to achieving national housing objectives." 436 F.2d at 820.

families "who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use." 42 U.S.C. §§1402(2), 1437a(2).

The specific federal housing objectives that are of special relevance here are: to administer federal housing programs in a manner affirmatively to further fair housing, 42 U.S.C. §3608(d)(5), to prevent discrimination in federal housing programs, 42 U.S.C. §2000d, to reduce the concentration of persons of lower income in central cities, 42 U.S.C. §5301(a)(1), and to foster the spatial deconcentration of housing opportunities for persons of lower income. 42 U.S.C. §5301(c) (6).* In its administration of the housing statutes to achieve these objectives HUD employs a geographic unit it calls the "housing market area" which it defines as "the geographic entity within which nonfarm dwelling units are in mutual competition." (Department of Housing and Urban Development, Federal Housing Administration techniques of

* In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972), this Court quoted one of the Senate sponsors of 42 U.S.C. §2000d as follows:

> "[T]he reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'"

The Second Annual Report on National Housing Goals of the President says:

> "It is imperative to reverse the trend toward a society that is becoming geographically divided not only on a racial basis but on economic and social bases as well. There must be an end to the concentration of the poor in land-short central cities, and their inaccessibility to the growth of employment opportunities in suburban areas." House Document No. 91-292, 91st Cong. 2d Sess., U.S. Govt. Printing Office, April 2, 1970, pp. 20-21.

Housing Market Analysis, January 1970, p. 10.)* Unlike the situation in *Milliken*, therefore, where the relevant geographic area was the local school district, the relevant geographic area for purposes of relief here is the Chicago housing market area. It is that area, encompassing Chicago and environs, to which the court of appeals directed the district court to address remedial planning in this case.**

Illustrative of HUD's employment of the housing market area in relation to the objective of deconcentrating housing opportunities for minorities is a HUD regulation setting

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* HUD further says:
"The housing market area usually extends beyond the city limits, regardless of the magnitude of the market under consideration . . . For practical purposes, the Standard Metropolitan Statistical Area may be delineated as the housing market area in those cases where an SMSA has been established." Department of Housing and Urban Development, Federal Housing Administration Techniques of Housing Market Analysis, January 1970, pp. 12-13.
Standard Metropolitan Statistical Areas "are prepared by the Office of Management and Budget to determine areas of economic and social integration, principally on the basis of the commuting patterns of residents." *United States* v. *Connecticut National Bank*, ... U.S. ....., 41 L.Ed. 2d 1016, 1028 (1974).

** For the Chicago area HUD defines the housing market area to be coterminous with the SMSA.
"The Chicago, Illinois, Housing Market Area is defined as being coterminous with the six-county Chicago Standard Metropolitan Statistical Area (SMSA), which, as currently defined, consists of Cook, DuPage, Kane, Lake, McHenry, and Will counties, Illinois." Department of Housing and Urban Development, Analysis of Chicago, Illinois Standard Metropolitan Statistical Area Housing Market, June 1966, p. 1.

forth criteria HUD employs in evaluating housing proposals. 37 Fed. Reg. 203 (January 7, 1972). For example, the regulation provides that the need for lower income housing is to be assessed in relation to the housing market area. *Id.* at 206. Particularly relevant here is the criterion, Minority Housing Opportunities, the objective of which is to "open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." The criterion calls for determining whether a proposed project "will be located [s]o that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed . . .," (*Ibid.*) In adopting the regulation HUD rejected suggestions "that the term 'housing market area' . . . should be defined to coincide with the boundaries of local political jurisdictions." The reason given for the rejection was that "housing market areas often are independent of arbitrary political boundaries . . ." *Id.* at 202.*

Another HUD regulation applicable to programs involved here provides that sites for newly constructed federally supported housing (under 42 U.S.C. §1437f) shall not be located in areas of minority concentration unless sufficient comparable housing opportunities for minority families exist outside such areas or there are overriding housing needs "which cannot otherwise feasibly be met

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* It was also suggested that certain parts of housing market areas should be allotted funds by HUD without regard to HUD's funding criteria, a suggestion HUD rejected because it could result in approving housing projects "which would be less than the best that could be created for the people of each housing market area." 37 Fed. Reg. 203.

in that housing market area." 39 Fed. Reg. 45169, 45173 (December 30, 1974).*

Thus, HUD's official position, as evidenced by its regulations, is that the problem of minority concentration must be seen from the perspective of the entire housing market area. That position is predicated upon HUD's view, stated to the district court, that the impact of concentrating the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community, and that only metropolitan-wide solutions will suffice to deal with that problem. (See Statement, *supra*, p. 4.) In that connection, as previously noted, among other steps HUD joined the respondents in representing to the district judge that a metropolitan remedy was the desirable form of relief in this case, and approved a contract providing for remedial housing for the plaintiff class in suburban areas, reading the governing statute as applying to the housing market area. (*Id.* at pp. 4-6.)

HUD has also explained certain provisions of state law as reflecting the realization that many cities must utilize areas outside their borders to meet their low-rent housing needs, and that slum elimination and providing housing for low income families are matters of metropolitan scope. Under Illinois law, for example, the normal area of operation of a city public housing agency extends three miles into any unincorporated area beyond the city boundary, while the normal area of operation of a county

* A HUD regulation applicable to federally subsidized housing programs not involved here says that its purpose is to "promote a condition in which individuals of similar income levels in the same housing market area have available to them a like range of choices in housing regardless of the individuals' race, color, religion or national origin." 37 Fed. Reg. 75 (January 5, 1972).

public housing agency embraces the entire county, including any cities within it (subject in both cases to exceptions where other public housing agencies already exist). Ill. Rev.Stat., ch. 67½, §§3, 17(b). In addition, Illinois public housing agencies may exercise their powers jointly within the area of operation of any one of them, and may operate outside their own areas of operation by contract with other public housing agencies or state public bodies. Ill.Rev.Stat., ch. 67½, §27c. Of provisions such as these HUD's General Counsel has said:

> "The provisions in State housing authorities laws which authorize a city housing authority to operate in an area 5 or 10 miles beyond the city's limits and which authorize it to operate in a county or other city with the consent of the governing body concerned, were included in these laws because it was realized that many cities would have to utilize the areas outside their borders in meeting their low-rent housing needs. It was recognized that the elimination of slums and the provision of decent housing for families of low income in the locality are matters of metropolitan area scope but of primary concern to the central city because the problem and impact are intensified there. In effect, therefore, the State legislatures have determined that the city and its surrounding area comprise a single 'locality' for low-rent housing purposes." (Plaintiffs' Exhibit 13, pp. 3-4.)
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> • • •

In sum, segregation by HUD here occurred within federal housing programs, federally supervised to achieve national housing objectives, among which is providing housing opportunities for low-income minority families, particularly central city families, outside existing areas of minority concentration. To assess the availability of such housing opportunities HUD's regulations and its statements and actions in this case look to the relevant housing

market area, not to the boundaries of local political jurisdictions or housing agencies, because it is acknowledged that the effects of the concentration of the poor and minorities in the central city extend throughout the market area. For remedial purposes, therefore, since HUD is an independently liable wrongdoer whose wrong consisted of the denial of housing opportunities outside areas of existing minority concentration, it is appropriate that the remedial plan encompass the area HUD defines as relevant to such denials, throughout which the effects admittedly spread. As to HUD, such a decree would not involve "inter-district" relief in the *Milliken* sense.*

B. There is Evidence Here of Constitutional Violations by HUD in the Suburban as Well as the Central City Portion of the Housing Market Area.

Another, wholly independent reason confirms the lack of conflict between *Milliken* and the decision of the Court of Appeals in this case. *Milliken* was bottomed upon the absence of evidence of segregation outside Detroit—there was "no claim" and "no evidence hinting" of anything but unitary systems in the suburban areas. 418 U.S. at 748-49. Here by contrast, as the Court of Appeals has said, "there is evidence of suburban discrimination." 503 F.2d at 937. Plaintiffs' Exhibit 11 shows that over the last twenty years a dozen federally supported housing projects have been developed in the suburban portion of the Chicago housing market area and that ten of these are located in (or, in one case in which census tract boundaries were changed, adjacent to) census tracts whose racial composition is

* It is perfectly possible, although not desirable and, we believe, not required by *Milliken*, for a metropolitan remedial decree to require action only by HUD. See the discussion in Section C, *infra*.

overwhelmingly black. A predictable result is that the occupancy of all but one of the projects is likewise virtually all black—of 949 apartments, 938 are occupied by blacks, 7 by other minorities, and 4 by whites.

The Chicago pattern is thus duplicated in the suburbs. Moreover, the pattern is no more adventitious in the suburbs than in the city; the record shows that such segregation in federally supported housing projects was the consequence of both federal and local policy. (Transcript of Proceedings, p. 148, November 28, 1972.)*

* In Congressional testimony then Secretary of HUD, George Romney, said that historically support or condonation of social and institutional separation of the races had become fixed in public law and public policy at every level and branch of government. "Thus," he concluded, "it was adopted as a matter of course by the Federal Government when it entered the housing field in the 1930's." He added that the federal government, through past and present policies, had contributed to the creation of segregated housing patterns, and pointed out that although the policies were changed beginning in the 1960's, the changes had had little practical effect on the pattern of residential segregation. Senate Report No. 92-900, 92nd Cong., 2d Sess., 121-22 (1970), quoted at *Oliver* v. *Kalamazoo Board of Education*, 368 F.Supp. 145, 184 (W.D. Mich. 1973). Evidence to the same effect was presented in this case. See, Transcript of Proceedings, pp. 121-187, November 28, 1972.

The petition refers to the court of appeals conclusion respecting the extra-city impact of segregation within the city as "supposition" and "speculative" (pp. 8, 15 n.17), yet the record not only contains HUD's assertion that the impact of central city segregation extends into the surrounding community, but evidence that segregated housing patterns within the central city and its surrounding community are intimately related, historically (Transcript of Proceedings, November 28, 1972, pp. 156-60), as well as currently. (*Id.*, November 27, 1972, pp. 92-93.) Given the definition of housing market areas as geographic units within which nonfarm dwelling units are in mutual competition, that impact is of course perfectly understandable.

Under this Court's opinion in *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189, 203 (1973), these facts respecting outlying portions of the housing market area, taken together with the de jure segregation by HUD within the Chicago portion of the market area, clearly establish a presumption of unlawful segregative conduct by HUD throughout the housing market area. Concurring in part and dissenting in part, Mr. Justice Powell would have held in *Keyes* that, although school board decisions obviously are not the sole cause of segregated school conditions, where segregated schools continue to exist over a period of years and to a substantial degree the Court would be justified in finding a prima facie case of a constitutional violation even without a showing of de jure segregation. 413 U.S. at 227-28. Under either of these tests, the evidence in this case supports a finding of a prima facie case of constitutional violations by HUD throughout the Chicago housing market area.*

For this separate reason the decision of the court of appeals does not conflict with *Milliken.*

C. Factors Decisive in Milliken are Not Present Here.

The discussion in Sections A and B has proceeded on the assumption that the Government's reading of *Milliken* is correct and that regardless of equitable considerations

* As Mr. Justice Powell pointed out in *Keyes,* in imposing on metropolitan southern school districts an affirmative duty . . . to eliminate segregation in the schools, the Court required these districts to alleviate conditions "which in large part did *not* result from historic, state-imposed de jure segregation." 413 U.S. at 222. Here we are dealing with conditions which, in part at least, concededly *have* resulted from historic, federally imposed de jure segregation.

Milliken stands as an impassable obstacle to inter-district remedies in every case that does not involve inter-district segregative acts or effects. But we believe *Milliken* is properly to be read as dealing with questions of equitable remedies, not substantive constitutional law. As Mr. Justice Stewart's concurring opinion stated,

> "[T]he Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." 418 U.S. at 753.

The general statements quoted in the petition as constituting the "holding" of *Milliken* are therefore to be understood in relation to the facts of that case.* It is

* "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia,* 19 U.S. 264, 399-400 (1821). (Opinion of Mr. Chief Justice Marshall.)

"In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots." *Lemon* v. *Kurtzman,* 411 U.S. 192, 201 (1973). (Opinion of Mr. Chief Justice Burger.)

The *Milliken* opinions did not of course purport to deal with situations other than school desegregation. Thus, a key sentence in the opinion written by Mr. Chief Justice Burger begins, "Before the boundaries of separate and autonomous *school districts* may be set aside. . . ." 418 U.S. at 744, emphasis supplied.

hardly likely that the opinion of Mr. Chief Justice Burger would have emphasized the "deeply rooted" tradition of local control over schools, the "logistical and other serious problems attending large-scale transportation of students," the "array of other problems in financing and operating this new [consolidated] school system," and the likelihood that the inter-district remedy contemplated in *Milliken* would require a "complete restructuring of the laws of Michigan relating to school districts" and could "disrupt and alter the structure of public education in Michigan," 418 U.S. at 741-43, if those factors were irrelevant to a judgment that could have been rested solely upon a pre-emptive foreclosure of inter-district remedies in every situation in which inter-district effects were lacking.

But none of those factors is to be found in this case. First, instead of a long tradition of local control over schools we have here "overall supervision" and "ultimate responsibility" respecting federally created, federally funded programs given by Congress to a federal agency to achieve national housing objectives that include increasing housing opportunities for low income minority families outside existing areas of minority concentration in central cities.

Second, instead of serious problems attending large-scale transportation of students and an array of problems in financing a new, consolidated school system, relief here could be limited to HUD's exercise of powers already conferred upon it by Congress to provide remedial housing within the housing market area. Thus, under 42 U.S.C. §1437f(b)(2) HUD may contract directly with private developers or owners for the construction or substantial rehabilitation of housing for lower-income families. Under 42 U.S.C. §1437f(b)(1), in areas where

no public housing agency has been organized or where HUD determines that a public housing agency is unable to implement the provisions of the section, HUD may similarly contract directly with private owners of existing dwellings to provide housing for lower-income families. In either situation, action by HUD alone — without the participation of any state-created housing agency — would provide remedial housing for the plaintiff class.

Finally, instead of a complete restructuring of state schools laws no restructuring of state housing laws would be involved at all if metropolitan relief were to be confined to HUD. If in the discretion of the district judge some "restructuring" would provide faster and more effective relief, a limited suspension of a single state statute would permit CHA to provide housing throughout the market area, something state law already authorizes it to do with the consent of, or jointly with, others. All that would be required under such a form of relief would be an order setting aside for the limited remedial purposes of this case the state statute which presently precludes CHA from so acting. Ill.Rev.Stat. ch. 67½, §27(c). No other local housing agencies would be required to do anything at all; in particular, no affirmative obligations would be imposed on local housing agencies other than CHA. (Such a form of relief would be closely analogous to an order entered previously in this case, 342 F.Supp. 827, aff'd 480 F.2d 210, cert. denied 414 U.S. 1144, similarly freeing CHA from the fetters of a state statute — which required CHA to obtain Chicago City Council approval before acquiring real property — found to be obstructing full and effective relief.)•

• This does not mean that relief should be confined to HUD, or to HUD and CHA, but only that those options

The petition claims that "considerations of practicality" similar to those found in *Milliken* would apply to fashioning metropolitan relief in this case. But in this respect the petition's assertions are simply not sound. The suggestion that the order of the court of appeals presages "massive federal intervention in areas of peculiarly local responsibility," and that "HUD's control over local public housing is far more limited than that of the State over local public schools" (petition, p. 12), is belied both by the pervasive "ultimate supervision and authority" role HUD has long played in the administration of federal housing programs and by Illinois' withdrawal of supervisory authority in favor of HUD with respect to federally supported projects. It also overlooks HUD's powers, referred to above, to provide housing "directly" without the intervention or participation of local public housing agencies. Similarly, the petition's concern about possible difficulties to be encountered in supplying municipal ser-

* (Continued)
are available to the district judge. Deference to the Congressional mandate of local responsibility would seem to dictate that state-created housing agencies in the market area participate in the remedial planning process to the extent they desire to do so. In addition, *Milliken* suggests that no metropolitan remedial steps be taken before a full opportunity has been afforded such agencies to assert any agency interests they believe may be affected by such steps, whether or not they choose to participate in the planning. And where necessary to provide full relief we believe that consistently with *Milliken* other state agencies exercising housing powers in the Chicago housing market area may be required to assist in remedying CHA's wrongs. *Franklin* v. *Quitman County Board of Education*, 288 F.Supp. 509, 519 (1968). Responsive to these considerations the district judge has now permitted a supplemental complaint to be filed which joins the appropriate state agencies.

vices to proposed federally supported housing (petition, pp. 12-13) overlooks the provisions of federal housing programs that authorize the use of existing housing, which is of course already provided with such services, 42 U.S.C. §§1421b, 1437f(b)(1), and the utilization of private developers of new housing who are responsible for making their own arrangements for municipal services. 42 U.S.C. §1437f(b)(2). Wherever desirable a remedial decree could rely heavily, even exclusively, on these existing housing and private developer provisions.*

It would be the antithesis of the practical flexibility in shaping remedies that is the hallmark of equity to lay down a rule that never, under any circumstances, could an inter-district remedy be justified absent a wrong that had inter-district effects. As suggested by Mr. Justice Powell, concurring in part and dissenting in part in *Keyes*, desegregation remedies must remain flexible and other values and interests than desegregation alone must be considered. 413 U.S. at 238. That sound principle cuts two ways. Where, as Mr. Justice Powell pointed out, desegregation may be accomplished only through massive busing which impinges upon other values and interests, desegregation remedies may have to be more limited than would be desirable from the perspective of desegregation alone. Here, on the other hand, no

* The petition's *in terrorem* assertion (p. 13) that "implementation of any inter-district remedy would require each of the more than 100 political jurisdictions in the metropolitan area that may be required to participate to provide the necessary municipal services," is thus quite incorrect. It is well to remember in this connection that it is HUD and a small handful of state-created housing agencies, not cities, villages and townships, who provide housing under federal housing programs in the Chicago housing market area.

significant and conflicting values and interests would be adversely affected by a desegregation decree limited to the relevant housing market area and not involving the consolidation of local governmental units. Under these circumstances there is no justification for confining a desegregation decree to a limited portion of the market area when to do so, as the court of appeals has found, would drastically limit the effectiveness of the decree.

Respecting the "variety of other public and private interests" that may bear upon the framing and implementation of a remedial decree in this case (Mr. Justice Powell in *Keyes,* 413 U.S. at 239), none appear in opposition to the metropolitan approach mandated by the court of appeals and many support it. In the latter category are national housing objectives already discussed, HUD's oft-expressed views favoring metropolitan remedies for housing segregation both generally and respecting the specific contours of this case, and HUD's selection of the housing market area as the relevant geographic unit with respect to the problem of minority concentration in central cities. Any conflicting state or private interests will of course be afforded an opportunity to be heard on remand, but none are apparent. The State of Illinois certainly has no interest in precluding HUD from continuing to administer its programs with respect to the problem of racial concentration on a housing market area basis. And since Illinois has by statute withdrawn from supervision over projects financed in whole or in part by the federal government where such projects are federally supervised or controlled, considerations of federal-state comity are largely or completely absent. Local community views will undoubtedly continue to be taken into account by HUD, but

by statute these are not binding upon HUD even apart from the necessity of providing full relief in this case. 42 U.S.C. §1439(c).* There are of course no private interests here comparable to those of parents and children discussed by Mr. Justice Powell in *Keyes,* 413 U.S. at 246-48, in the busing context.

In its normal administration of federal housing programs HUD has chosen to address its regulations and administrative activities respecting minority concentration to a housing market area larger than the areas of operation of participating state-created housing agencies. It would therefore be an arbitrary and unjustifiable hobbling of equitable powers to foreclose the district court from directing HUD to employ that same market area in performing its duty to "so far as possible eliminate the discriminatory effects of the past." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

Apart from equitable considerations, it seemed clear to this Court that the lower courts *in Milliken* held the view "that total desegregation of Detroit would not produce the racial balance which they perceived as desirable." 418 U.S. at 740. Mr. Chief Justice Burger's opinion went on to say that the lower courts had proceeded on the assumption that the Detroit schools could not be truly desegregated unless the racial composition of the

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* Under the conventional, turnkey and leased housing programs, state-created housing agencies, not cities, villages, counties or other units of local government, must demonstrate housing needs to HUD's satisfaction to secure financing. 42 U.S.C. §1415(7). Under the housing assistance program a local governmental unit's determination of housing needs is subject to review by HUD for consistency with generally available facts and data. 42 U.S.C. §5304(c).

student body "of each school" substantially reflected the racial composition of the population of the metropolitan area as a whole, and the opinion quoted the district court's view that desegregation required that "no school, grade or classroom" be substantially disproportionate to overall pupil racial composition. *Ibid.* The Court said that such an approach was inconsistent with *Swann* v. *Charlotte-Mecklenberg Board of Education,* 402 U.S. 1 (1971).

In this case no comparable view concerning racial balance, or the racial composition of housing projects (the analogy here to the racial composition of the student body of schools), has been expressed or employed. The remedy called for here, the provision of remedial housing, is most nearly analogous to the building of new school buildings. (Nothing like busing or the pairing of schools — techniques that mandate an involuntary rearrangement of existing pupil travel patterns — is involved. Remedial housing will be occupied by those, and only those, who voluntarily apply for it.) This Court has not hesitated to make it clear that it is an appropriate element of a school desegregation decree to see to it that future school buildings are so located that they do not perpetuate segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. at 20-21. Such provisions of school desegregation decrees have never been thought to involve impermissible racial balance notions. Here, where the focus of a plan to provide remedial housing for the plaintiff class is likely to be upon just such future location criteria, the Court is obviously not presented with a situation comparable to a decree that seeks to provide a particular racial mix in all schools, grades or classrooms.

Finally, the Court's opinion in *Milliken* emphasized the "crucial fact" that the theory of that case was altered in midstream from an intra- to an inter-district approach, observed that neither the parties nor the trial judge "were concerned with a foundation for inter-district relief," and said that "neither the plaintiffs nor the trial judge considered amending the complaint to embrace the new theory." 418 U.S. at 752.

The situation here is quite different. As already discussed, a limited form of metropolitan relief was included in the decree against CHA (and implementation of it was assisted by HUD), while the companion case against HUD has focussed on metropolitan relief from the outset. After HUD's liability was established plaintiffs proposed an interim order that invited recommendations from HUD and CHA as to additional parties they might wish to join in connection with the consideration of a metropolitan remedy (Appendix p. 40 to plaintiffs' brief in the court of appeals), plaintiffs having already specified the additional parties they would add if leave were granted to file an amended or supplemental complaint. (Record Doc. 301, Appendix to Plaintiffs' Memorandum, p. i.)

This case is therefore in an essentially different procedural posture than *Milliken.* The theory of the case was not altered in midstream and the plaintiffs *were* concerned with a foundation for metropolitan relief and with amending their complaint to embrace a prayer for such relief and to add parties who might be thought to be affected by it.•

• • •

• The procedural situation is almost identical to that considered by the court of appeals in *Gautreaux* v. *City of Chicago,* 480 F.2d 210 (1973), cert. denied, 414 U.S.

For the reasons discussed in this Section C also — the absence of the equitable factors that loomed large in *Milliken*, of any racial balance notion in the decision of the court of appeals, and of any procedural impropriety in approaching the question of metropolitan relief — *Milliken* does not control here.

II. The Decision Below Will Not Hamper Implementation of Federal Programs.

The petition says that "uncertainty" caused by this case may discourage participation by suburban jurisdictions in federal programs. The "chilling effect" is ascribed to the fear that, because an implication of the decision below is that some federally assisted housing for central city residents may be located in suburban areas, suburbs may be deterred from participating in federal housing and community development programs. (Petition, pp. 9-10.) This contention reflects both a misunderstanding

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• (Continued)
1144 (1974). There plaintiffs determined that to implement effective relief it would be necessary to add additional parties and to hold an evidentiary hearing in which the proposed further relief, and its impact on the additional parties were it to be granted, could be explored in a hearing in which the additional parties would be accorded a full opportunity to be heard and to present evidence. A supplemental complaint was filed after the trial court granted leave to do so. The court of appeals held that the procedure was proper and this Court denied certiorari. *Gautreaux* v. *City of Chicago, supra.* The effort to follow the same procedure as to metropolitan relief was of course aborted by the district court's ruling against consideration of such relief. As noted above, a supplemental complaint adding new parties respecting the metropolitan remedial proceedings has now been filed in the district court.

of law and an implicit judgment that runs counter to Congressionally established policy.

As to the former, the petition implies that a "community [must] take steps to participate" in housing programs established by the Housing and Community Development Act of 1974 before those programs may be employed. (*Id.*, p. 10, n.11.) In fact under the 1974 law, housing funds are applied for and housing projects are operated by housing developers, public (*i.e.*, state-created agencies) or private. 42 U.S.C. §1437f. The failure of a suburban community to apply for quite separate community development funds, 42 U.S.C. §5301 et seq., would not preclude HUD from supplying housing funds to housing developers for federally supported housing designed to house central city residents in that community. In such a case the suburban community is entitled to a 30-day period within which it may furnish the Secretary of HUD with "comments or information," but the final determination as to whether housing is to be provided is to be made by HUD based on HUD's determination of housing need. 42 U.S.C. §1439(c). It would be a mistaken suburban community that decided not to participate in the community development block grant program because it believed it might thereby prevent housing developers from providing federally supported housing within its borders.

The petition's argument also conflicts with the policy of the 1974 Act which favors the dispersal of low-income housing outside central cities. The initial Congressional finding in that Act is that urban communities face critical problems in part because of "the concentration of persons of lower income in central cities," 42 U.S.C. §5301(a)(1), and among the law's primary objectives is "the spatial deconcentration of housing opportunities for persons of

lower income . . ." 42 U.S.C. §5301(c)(6). The Act also specifies that housing needs of lower-income persons are to include not only the needs of residents but the needs of those "expected to reside" in the community as well. 42 U.S.C. §5304(a)(4)(A). Referring to this provision the key legislative committee report says,

> "The committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well." House of Representatives Report No. 93-1114, 93d Congress, 2d Session, p. 7.

To the extent the decision below looks toward the provision of housing opportunities for low-income central city residents outside the central city, it is thus entirely consistent with the policy of the law.*

III. Review Now Would be Premature.

The practice of this Court not to grant certiorari to review a nonfinal judgment, "such as one remanding the case to the district court for a new trial," Stern and Gressman, Supreme Court Practice 180 (4th ed. 1969), should be followed here. Lack of finality of course "alone furnish[es] sufficient ground for the denial [of

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* The petition's argument would seem to translate as follows: if the ruling of the court of appeals stands suburbs may get the impression that they may have to house some central city low-income people and this impression will deter them from allowing federally supported housing within their borders and from applying for community development block grants. Therefore the Court must dispel this erroneous impression so that community development grants and housing subsidies can flow to suburbs that house only their present residents. Compare this with the quotation fom the President's Report on National Housing Goals, *supra*, p. 15.

certiorari]." *Hamilton-Brown Shoe Company* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). See also *Brotherhood of L.F.&E.* v. *Bangor & A.R.C.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). The mistaken "considerations of practicality" advanced in the petition (pp. 12-13), already discussed above, evidence the wisdom of these principles and their applicability here. The petition's contentions simply prejudge those asserted considerations, and no record is available to this Court upon which to assess the judgment.*

It may be pointed out in this connection that *Milliken* arrived in this Court following two decades of school desegregation litigation during which the Court many times grappled with the flinty difficulties of implementing school desegregation decrees. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 11-15 (1971), and *Green* v. *School Board of New Kent County*, 391 U.S. 430, 435-39 (1968), detailing the history of this Court's review of school desegregation cases and tracing the Court's gradual development of guidelines for lower courts fashioning equitable remedies in such cases. In its first encounter with school desegregation remedies, *Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955), the Court said that "[b]ecause of their proximity to local conditions and the possible need for further hearings . . ." remedial techniques should be worked out,

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* Moreover, as discussed in Section IA above, the essential *Milliken* issue of when and under what circumstances it is appropriate to impose affirmative obligations upon "innocent" state entities to aid in remedying the wrongs of a "guilty" one will not even be presented in this case should the district court confine a metropolitan remedial order to HUD or to HUD and CHA.

initially at least, by the district courts. Significantly, the Court did not begin to enunciate specific remedial guidelines until it was faced with detailed plans already considered at the lower court level. See, *e.g., Goss* v. *Board of Education,* 373 U.S. 683 (1963), as well as *Swann* and *Green.* Given that history and background the Court in *Milliken* was understandably in a position to express a judgment concerning practical implementation problems without having a specific remedial decree before it.

There is no comparable history of housing desegregation litigation in this Court, nor any litigation at all in which the complex federal statutory housing scheme is considered in relation to the obligation of the district court to "consider the use of all available techniques," *Davis* v. *Board of School Commissioners,* 402 U.S. 33, 37 (1971), to achieve desegregation. A record in which those matters have not yet been explored, especially where, as here, the range of remedial options open to the district court is considerable, is a "treacherous record for deciding issues of far-flung import." *Kennedy* v. *Silas Mason Co.,* 334 U.S. 249, 257 (1948).

CONCLUSION

This case should not be decided by the invocation of a term, "inter-district," and speculation as to what a remedial decree might look like. In *Milliken* the meaning and application of "inter-district" was clear. At issue, whatever precise form the decree might take, was the propriety of consolidating local school districts. Here, in the new and markedly different context of federal housing

programs, where we approach "the fundamental problem of residential segregation" (Mr. Justice Powell in *Keyes,* 413 U.S. at 249), the term "inter-district" obscures the issue if it is uncritically employed, as in the petition, to refer to a wide range of possible remedial arrangements. It is clear that the ultimate remedy selected by the trial court will be confined to an area that is not "inter-district" as to HUD and will not involve the consolidation of any local governmental units — need not, indeed, require local governmental units to do anything at all. This alone should dictate denial of the petition. If the application of the district court's equitable powers to shape a remedial decree were to create any tension with *Milliken* or other authority, that would be the appropriate time — upon an appropriate record — for this Court's review.

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No. 74-1047

In the Supreme Court of the United States

OCTOBER TERM, 1974

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

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This case is governed by *Milliken* v. *Bradley,* No. 73-434, decided July 25, 1974. The sole violation of law the Department of Housing and Urban Development (HUD) has been found to have engaged in is that, within the City of Chicago, it acquiesced in the Chicago Housing Authority (CHA) practice of discriminatory site selection for public housing; there is no evidence in this record that this acquiescence had any effect outside of Chicago (Pet. App. C, p. 38a). *Milliken* v. *Bradley* indicates that "absent an inter-district violation there is no basis for an inter-district remedy" (slip op. 32). The court of appeals in this case nevertheless directed the district court to include areas outside the City of Chicago in a comprehensive plan of relief (Pet. App. D, p. 59a). It did so on the apparent theory, rejected in *Milliken* v. *Bradley,* that the white population of the subrubs is an available resource to accomplish a desirable racial balance in public housing for residents of Chicago. Respondents' attempts to distinguish *Millikin* v. *Bradley* are unpersuasive.

1. Respondents suggest that this Court may properly ignore the inter-district character of the metropolitan area-wide plan the district court has been directed to develop because, they allege, "the proposed remedy is not 'inter-district' as regards HUD" (Br. Opp. 11). This argument necessarily assumes that the plan can properly be analyzed solely on the basis of its relation to one of the participants, and thus that the same plan might be proper as to HUD even if improper as to the local housing authorities who are necessary participants in the provision of adequate housing. Although HUD collects housing data, makes studies, and attempts to co-ordinate housing developments on an area-wide basis, it nevertheless implements its program through co-operation with local housing authorities, since it has no legal power to coerce them to participate in any co-ordinated metropolitan area-wide plan.[1] Similarly, the State in *Milliken* v. *Bradley* implemented its plans through local school districts, and, although it had ultimate authority to compel compliance with a metropolitan area-wide plan (Marshall, J., dissenting, slip op. at 13-18), such a plan was inappropriate inter-district relief as to the State as much as to the local school districts. *A fortiori,* here, where HUD implements its plans through local housing agencies, and has no power to compel their compliance with any general plan, a metropolitan area-wide plan is inter-district relief as to HUD as much as it is to CHA and the suburban housing agencies.

[1]The respondents suggest (Br. Opp. 24-25) that as a theoretical possibility HUD could be ordered to implement an area-wide plan by contracting directly with private developers; they are careful to emphasize that they believe this would be undesirable (Br. Opp. 20 n., 25-26 n.). Such contracts can be made only if private developers agree to participate. In any event, the implication that local communities are not involved when HUD contracts directly with private developers is incorrect. Although HUD needs no co-operation agreement with the local jurisdiction in those circumstances, the developer cannot prepare an acceptable proposal without qualifying under local zoning regulations and for the provision of needed services by local authorities.

In this case, the court has found a violation within Chicago which it proposes to remedy by bringing in suburban agencies in order to increase the white fraction of the racial pool available for judicial planning. Absent coerced consolidation of separate housing authorities by judicial decree, the suburbs, which have not been shown to be involved in any violation, would be free, as Congress intended, to accept or reject participation in a metropolitan area-wide plan (Pet. 9-10, nn. 10-11).[2] That coercion cannot be effective if directed solely against HUD; HUD's basic role under the 1974 Act is to assist the local political jurisdiction in carrying out its housing plan. Thus, what is involved here is inter-district relief without an inter-district violation, which is contrary in principle to this Court's decision in *Milliken* v. *Bradley*.

2. The evidence does not support inter-district relief. The district court found that it has not been alleged or shown that CHA or HUD had discriminated or fostered discrimination outside of Chicago (Pet. App. C, p. 38a). The court of appeals nevertheless suggested two ways in which the inter-district violation prerequisite under *Milliken* v. *Bradley* for inter-district relief could be found in this record: either by the "evidence of suburban discrimination" in Plaintiffs' Exhibit 11 (Pet. App. D, p. 54a) or by the speculation that discrimination within Chicago "may well have fostered racial paranoia and encouraged the 'white flight' phenomenon" (Pet. App. E, p. 62a).

We have explained in our petition for a writ of certiorari (p. 14, n. 16) why Plaintiffs' Exhibit 11 does not support the court's interpretation of it. In any event, it is no more persuasive than the evidence of suburban discrimination rejected in *Milliken* v. *Bradley, supra*, slip op. at 28-32). The court's specula-

[2]See 42 U.S.C. 1401, 42 U.S.C. 1437 (88 Stat. 653), 42 U.S.C. 1415(7), 42 U.S.C. 5301 (88 Stat. 633).

tion concerning "white flight" is equally unavailing. Even if such conjecture without evidentiary support could ever be sufficient, this example will not do. For, if it is assumed that whites in Chicago desired segregation the effect of public housing segregation within the city presumably would have been to slow "white flight," not to encourage it. In any event, the court of appeals' speculation here would have applied equally to the segregation involved in *Milliken* v. *Bradley*. If the court's reliance on it here were justified, it would similarly have compelled a finding of inter-district effect in *Milliken* v. *Bradley*. But it was inadequate there, and is equally inadequate here.

3. Review is not premature. This case is now at the same stage as was *Milliken* v. *Bradley* when this Court granted certiorari: A court of appeals has ordered a district court to develop a plan of affirmative relief that would effectively consolidate a variety of legally separate governmental entities to remedy a discrimination found in only one of them. Pursuant to that mandate, respondents have moved slow to bring in 11 local housing authorites and 3 state agencies as parties defendant, and the district court has so ordered. Here, as in *Milliken,* the judicial formulation of an inappropriately broad plan is about to begin. Thus, here, as in *Milliken,* the case is ripe for review.

Respondents suggest that review at this stage in *Milliken* v. *Bradley* was appropriate only because of this Court's previous consideration of school desegregation issues, and that, in the absence of such experience with problems of housing desegregation, review is inappropriate here. But *Milliken* v. *Bradley* did not turn on this Court's expertise concerning the nature of the inter-district plan that would be developed there; it held instead

that *no* valid inter-district plan could be developed on the basis of the record in that case. This record, like that one, shows that any inter-district relief would be inappropriate. It is no more desirable here than it was there to await the development of a specific plan before making that decision.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Summary of argument	13
Argument:	
It is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation	15
A. Separate governmental districts may not be consolidated for remedial purposes in the absence of findings of inter-district violation and inter-district effect	15
B. There was no finding here of any inter-district violation or inter-district effect	19
1. The unlawful racial discrimination found by the courts below related solely to racially discriminatory public housing practices within the political boundaries of the City of Chicago	20
2. The discriminatory public housing practices within the City of Chicago had no discernible segregatory inter-district effect	26

Argument—Continued — Page

C. Practical considerations also militate against the award of inter-district relief in this case — 28

1. An inter-district remedy here would be contrary to the statutory scheme, which reserves to the local community the decision whether to participate in federally funded public housing programs — 29

a. Low-rent public housing — 31

b. Block grants — 32

c. Leased public housing — 33

2. The administrative problems inherent in a judicially devised and enforced metropolitan area-wide public housing plan would be substantial — 34

Conclusion — 40

CITATIONS

Cases:

Bradley v. *Milliken*, 484 F. 2d 215, reversed, 418 U.S. 717 — 22

Brown v. *Board of Education*, 349 U.S. 294 — 15

Chicago Housing Authority v. *Austin*, 511 F. 2d 82 — 11

Clark v. *Universal Builders, Inc.*, 501 F. 2d 324, certiorari denied, 419 U.S. 1070 — 23

Cases—Continued — Page

Croskey Street Concerned Citizens v. *Romney*, 459 F. 2d 109 — 38-39

Gautreaux v. *Chicago Housing Authority*, 265 F. Supp. 582 — 5

Gautreaux v. *Chicago Housing Authority*, 296 F. Supp. 907 — 5, 6, 8

Gautreaux v. *Chicago Housing Authority*, 304 F. Supp. 736 — 6, 7

Gautreaux v. *Chicago Housing Authority*, 342 F. Supp. 827, affirmed, 480 F. 2d 210, certiorari denied, 414 U.S. 1144 — 9

Gautreaux v. *Chicago Housing Authority*, 384 F. Supp. 37 — 11

Gautreaux v. *Chicago Housing Authority*, 436 F. 2d 306, certiorari denied, 402 U.S. 922 — 7

Gautreaux v. *Romney*, 332 F. Supp. 366, reversed, 457 F. 2d 124 — 9, 18

Griffin v. *County School Board*, 377 U.S. 218 — 30

James v. *Valtierra*, 402 U.S. 137 — 37

Milliken v. *Bradley*, 418 U.S. 717 — 2, 10, 11, 13, 14, 16, 17, 18, 19, 23, 25, 26, 28, 29, 30, 35, 37, 38

Swann v. *Board of Education*, 402 U.S. 1 — 15, 39

Warth v. *Seldin*, No. 73-2024, decided June 25, 1975 — 38

Constitution and statutes:

United States Constitution, Fifth Amendment — 4, 9

Constitution and statutes—Continued — Page

Civil Rights Act of 1964, Title VI, 78 Stat. 252, *et seq.*, 42 U.S.C. 2000d, *et seq.*:

Sec. 601, 42 U.S.C. 2000d — 2, 4, 9, 18
Sec. 602, 42 U.S.C. 2000d-1 — 18

Housing and Community Development Act of 1974, 88 Stat. 633, *et seq.*:

Sec. 103, 88 Stat. 637 — 32
Sec. 104, 88 Stat. 638, 639 — 32, 33
Sec. 201, 88 Stat. 653, *et seq.* — 31
88 Stat. 653 — 31
88 Stat. 656 — 31
88 Stat. 658 — 31, 32
88 Stat. 660 — 32
88 Stat. 662 — 33
Sec. 213(a), 88 Stat. 674 — 34
Sec. 213(c), 88 Stat. 675 — 34

United States Housing Act of 1937, 50 Stat. 888, *et seq.*, as amended, 42 U.S.C. 1401, *et seq.* — 31
42 U.S.C. 1401 — 31
42 U.S.C. 1410 — 31
42 U.S.C. 1410(h) — 32
42 U.S.C. 1415(7) — 31, 32
42 U.S.C. 1421b — 33
42 U.S.C. 1421b(a) — 33

Illinois Revised Statutes (1959):

c. 67 1/2, § 3 — 7
c. 67 1/2, § 9 — 5
c. 67 1/2, § 17(b) — 7
c. 67 1/2, § 27c — 7

Miscellaneous: — Page

Fed. R. Civ. P. 23(a) — 38
H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. (1974) — 30
Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. Pa. L. Rev. 1330 (1974) — 39
Recent Cases, *Administrative Law-Urban Renewal*, 85 Harv. L. Rev. 870 (1972) — 39
S. Rep. No. 93-693, 93d Cong., 2d Sess. (1974) — 30
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United States Department of Commerce, *1970 Census of Population and Housing*, PHC(1)-43 — 24

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

DOROTHY GAUTREAUX, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The initial opinion of the district court (Pet. App. 1a-16a) is unreported. The initial opinion of the court of appeals (Pet. App. 17a-36a) is reported at 448 F. 2d 731. The district court's decision denying metropolitan relief (Pet. App. 37a-40a) is reported at 363 F. Supp. 690. The court of appeals' decision reversing that order (Pet. App. 41a-60a) and its order denying rehearing (Pet. App. 61a-63a) are reported at 503 F. 2d 930 and 939.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64a) was entered on August 26, 1974, and a timely petition for rehearing was denied on September 30, 1974. On December 20, 1974, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including February 13, 1975, and on February 6, 1975, Mr. Justice Brennan further extended the time for petitioning to and including February 20, 1975. The petition was filed on the latter date and granted on May 12, 1975 (App. 223). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in light of *Milliken* v. *Bradley*, 418 U.S. 717, it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violaton.

STATUTE INVOLVED

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

STATEMENT

Respondents, six black residents of Chicago, Illinois, brought this action in 1966 against the Housing Assistance Administration, then an agency of the Department of Housing and Urban Development ("HUD"), on behalf of the class of black tenants in, and applicants for, family public housing projects in Chicago (Complaint, pp. 2-3; App. 26-27).[1] The complaint alleged generally that HUD was unlawfully "assist[ing] in the carrying on of a racially discriminatory public housing system within the City of Chicago" (Complaint, p. 2; App. 26). Respondents sought a declaratory judgment, an injunction against any further federal financial assistance to the Chicago Housing Authority ("CHA") "in support of the racially discriminatory aspects of the public housing system within the City of Chicago," and "such other and further relief as the Court may deem just and equitable" (Complaint, pp. 15-16; App. 34-35).

More specifically, the complaint alleged that the residential areas within the City of Chicago were "highly segregated along racial lines," and that most of the tenants in, and applicants for, family public housing projects in Chicago were black (Complaint, p. 5; App. 28); that between 1950 and 1966 "[s]ub-

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[1] In 1969, respondents advised the district court that the first named plaintiff-respondent, Dorothy Gautreaux, had died (Suggestion on Record of Death, filed July 14, 1969; App. 40). There are, however, five other named plaintiff-respondents, and the cause has been certified as a class action. 265 F. Supp. 582, 583.

stantially all" of the sites for family public housing selected by CHA and approved by the Chicago City Council had been located in predominantly black residential areas of the City (Complaint, pp. 9-11; App. 30-32); that all sites selected for the five projects proposed in 1965 and the twelve projects proposed in 1966 were in predominantly black areas (*ibid.*); that CHA had "deliberately chosen sites for such projects which would avoid the placement of Negro families in white neighborhoods" (Complaint, p. 11; App. 32); and that the effect of this practice was to "continue and strengthen existing patterns of residential and school segregation in the City of Chicago * * *" (Complaint, p. 13; App. 33).

The complaint alleged that HUD was implicated in this segregatory practice by virtue of the fact that it had in the past provided financial assistance to CHA for the construction of public housing projects in Chicago and either already had provided similar financial assistance, or had assured CHA that it would provide such assistance, in connection with the proposed 1965 and 1966 projects (Complaint, p. 14; App. 33-34). Respondents claimed that, by providing such assistance, HUD had violated both the Fifth Amendment (Count I of the Complaint, pp. 14-15; App. 34) and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d (Count II of the Complaint, pp. 16-18; App. 35-36).[2]

[2] Counts III and IV of the Complaint were similar to Counts I and II but failed to allege that CHA had deliberately chosen sites to avoid placing black families in white neighborhoods (Complaint, pp. 19-22; App. 36-39).

This action was stayed in the district court pending disposition of respondents' companion suit against CHA. In that suit, the district court granted summary judgment against CHA, finding that its site-selection and tenant-assignment practices had been intentionally discriminatory. *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill.).[3] The facts underlying this finding were as follows: Ill. Rev. Stat., c. 67½, § 9 (1959), required approval by the City Council of each public housing site proposed by CHA; before submitting a proposal to the council for approval, CHA would informally submit it for the approval of the alderman in whose ward the site was located; between 1955 and 1966, CHA proposed 41 sites for family public housing in predominantly white residential areas and 62 sites in predominantly black residential areas, but only 2 of the sites in white neighborhoods were approved by the local alderman and the City Council, whereas 49 of the sites in black neighborhoods were approved (296 F. Supp. at 911); over 99½ percent of the units planned for white neighborhoods had been vetoed by the local alderman or City Council, whereas only about 10 percent of the units planned for black neighborhoods had been vetoed (296 F.

[3] The court had earlier dismissed those counts of the complaint against CHA which failed to allege deliberate discrimination. *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill.).

Supp. at 912).[4] The district court concluded that "[n]o criterion, other than race, can plausibly explain [this pattern]" (*ibid.*). The district court also found that CHA had imposed racial quotas restricting the number of black tenants in four older family public housing projects that had been built in white neighborhoods. 296 F. Supp. at 909.

The district court enjoined CHA from clearing proposed sites informally with local aldermen and directed CHA to adopt a new tenant-assignment policy. *Gautreaux* v. *Chicago Housing Authority*, 304 F. Supp. 736, 739, 741 (N.D. Ill.). In addition, the court directed CHA to build its next 700 dwelling units in the substantially white neighborhoods of Chicago (*i.e.*, the neighborhoods of Chicago within the "General Public Housing Area"[5]). 304 F. Supp. at 737, 738.[6] The court's order provided that, thereafter, CHA must locate at least three-fourths of its new family public housing units in the General Public Housing Area. The order permitted

[4] The facts with regard to public housing for the elderly were quite different from those pertaining to family public housing. The district court found that 54½ percent of CHA's 5,050 units of public housing for the elderly were in substantially all white neighborhoods. 296 F. Supp. at 911. Respondents' suits against HUD and CHA relate only to family public housing.

[5] The court's order defined "General Public Housing Area" as those portions of Cook County that lie at least one mile from any census tract having a non-white population of 30 percent or more. The rest of Cook County constitutes the "Limited Public Housing Area".

[6] Certain pending projects were exempted from this requirement. 304 F. Supp. at 738.

CHA to locate up to one-third of its new units outside the City of Chicago. 304 F. Supp. at 739. Although CHA's jurisdiction does not extend beyond the City's political boundaries, it is authorized to contract with the Cook County Housing Authority to construct and operate units throughout the county. See Ill. Rev. Stat., c. 67½, §§ 3, 17(b), 27c (1959).[7] CHA was also ordered to "use its best efforts to increase the supply of Dwelling Units as rapidly as possible * * *" (304 F. Supp. at 741) and to submit reports to the court regarding its activities in implementing the decree. The decree was subsequently modified to order CHA to propose sites for 1,500 dwelling units by a specified date. The district court's order was affirmed by the court of appeals, *Gautreaux* v. *Chicago Housing Authority*, 436 F. 2d 306 (C.A. 7), and this Court denied certiorari. 402 U.S. 922.

[7] In the court below, respondents stated (Brief of Plaintiffs-Appellants, filed March 11, 1974, p. 39, n. 2):

> The voluntary effort was a 100% failure. CHA and the Housing Authority of Cook County (HACC) entered into an agreement for the joint development of public housing in suburban communities, and HUD approved the agreement on June 26, 1972. (CHA Report No. 6, pp. 6-7, Record Doc. 287.) Under an arrangement with CHA, letters were then sent by HACC to 103 mayors and presidents of cities and villages in Cook County. Negative or no responses were received from 98, two others said the matter was being studied (there was no further word from them), and three who indicated a willingness to discuss the matter ultimately declined to proceed further. [Plaintiffs' Exhibit 12.]

The district court then dismissed the action against HUD for lack of jurisdiction and failure to state a claim upon which relief could be granted (Pet. App. 1a-16a). The court of appeals reversed and directed that summary judgment be entered for respondents (Pet. App. 17a-36a). Both courts acknowledged that HUD had made "numerous and consistent efforts" toward desegregating public housing in Chicago (Pet. App. 9a, 28a) and that HUD had tried to correct "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take" (Pet. App. 12a, 33a).[8] The court of appeals also stated that it was "fully sympathetic" with HUD's "dilemma" of having to choose between, on the one hand, perpetuating residential segregation by funding the construction of desperately needed public housing (see Pet. App. 29a, n. 12) on the sites that had been approved by the City Council and, on the other hand, "deny[ing] housing altogether to the thousands of needy Negro families of [Chicago]" (Pet. App. 29a, 31a).

Nevertheless, the court of appeals held that "HUD's knowing acquiescence in CHA's admitted discrimina-

[8] In 1966, HUD rejected five of the sites selected by CHA which were among those specifically challenged in respondents' complaint. The sites were rejected because they were in black neighborhoods characterized, at least in some cases, by a high concentration of public housing (Deposition of Joseph Burstein filed January 15, 1970, p. 105; App. 41). That year, for the first time in more than twenty years, the Chicago City Council approved family public housing sites in white neighborhoods. See *Gautreaux* v. *Chicago Housing Authority, supra*, 296 F. Supp. at 911.

tory housing program" denied respondents due process, in violation of the Fifth Amendment, and also violated Section 601 of the 1964 Civil Rights Act, 42 U.S.C. 2000d (Pet. App. 29a). The court emphasized that its "holding should not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency" and suggested that the district court might find that "little equitable relief above the entry of a declaratory judgment and a simple 'best efforts' clause will be necessary to remedy the wrongs which have been found to have been committed" (Pet. App. 36a).

On remand, the district court consolidated the two actions against CHA and HUD (see Order entered November 26, 1971; App. 49), and has attempted since that time to frame and implement appropriate remedial decrees.[9] In the order underlying the present petition, the district court directed HUD to use its "best efforts to cooperate with CHA in its efforts

[9] In one remedial decree, the district court enjoined HUD from releasing model cities funds to Chicago until the City Council approved 700 sites for public housing. *Gautreaux* v. *Romney*, 332 F. Supp. 366 (N.D. Ill.). The court of appeals reversed that order on the ground that it was improper to threaten the termination of one program, untainted by discrimination, in order to remedy discrimination in a different program. *Gautreaux* v. *Romney*, 457 F. 2d 124 (C.A. 7).

In another remedial decree, the district court ordered CHA to proceed with the construction of 1,500 dwelling units. *Gautreaux* v. *Chicago Housing Authority*, 342 F. Supp. 827 (N.D. Ill.), affirmed, 480 F. 2d 210 (C.A. 7), certiorari denied, 414 U.S. 1144.

to increase the supply of dwelling units, in conformity with" all applicable federal statutes, HUD rules and regulations, and the provisions of the judgment against CHA and all other final orders in this litigation (Pet. App. 40a).

The district court rejected the order proposed by respondents, which would have directed CHA and HUD to use their best efforts to provide dwelling units outside the City of Chicago in Cook, DuPage, and Lake Counties, and refused to conduct additional proceedings designed to develop a plan of metropolitan area-wide relief.[10] The court stated (Pet. App. 38a):

> [S]uch relief * * * is simply unwarranted here because it goes far beyond the issues of this case. * * * [T]he wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein.

The court of appeals reversed and remanded the case to the district court for "adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago * * * but will increase the supply of dwelling units as rapidly as possible" (Pet. App. 59a). The court distinguished *Milliken* v. *Bradley*, 418 U.S. 717, which had been decided while

[10] See Plaintiffs' Motion and Proposed Order, filed January 29, 1973 (App. 202-207).

the appeal was pending, on the grounds that there was no tradition of local control of public housing comparable to the tradition in public schools, that the administrative problems of an inter-district remedy are far less serious for public housing than for schools, that there was evidence of racial discrimination in public housing in the Chicago suburbs, and that HUD and CHA had agreed that a metropolitan solution to the Chicago housing problem was necessary. Judge Tone dissented on the ground that *Milliken* was controlling (Pet. App. 60a).

In denying the government's motion for rehearing, the court of appeals concluded that the showing of a significant inter-district segregative effect required by *Milliken* as a precondition of an inter-district remedy was met in this case by the supposition that "defendants' discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight'" to the suburbs (Pet. App. 62a).[11]

[11] The court of appeals also directed that "intra-city relief should proceed apace without further delay" (Pet. App. 63a). The district court then referred the case to a master "to determine and identify the precise causes of the five-year delay in implementing [the court's] judgment orders, and to recommend a plan of action that will expedite the realization of [its] various orders and judgments." *Gautreaux* v. *Chicago Housing Authority*, 384 F. Supp. 37, 38 (N.D. Ill.). CHA's petition for mandamus seeking to vacate this referral was denied. *Chicago Housing Authority* v. *Austin*, 511 F. 2d 82 (C.A. 7).

On September 30, 1974, CHA reported to the district court that construction had commenced on four projects for 63 dwelling units, the first units constructed under the 1969

On February 25, 1975, the district court granted respondents' motion to file a supplemental complaint and to add as defendants eleven local housing authorities, the Illinois Housing Development Authority, the Northeastern Illinois Planning Commission, and the director of the Illinois Department of Local Government Affairs (Order entered February 25, 1975; App. 211).[12] The supplemental complaint does not allege that any of the newly added defendants has injured respondents, but it nevertheless requests a declaration that the new defendants should "participate in carrying out and implementing the judgment orders of the Court heretofore entered in this consolidated cause and in the development and implementation of a comprehensive metropolitan area plan to disestablish and remedy the effects of the segregated public housing system in Chicago by increasing the supply of dwelling units as rapidly as possible" (Second Supplemental Complaint, p. 9; App. 218-219). The supplemental complaint also requests an order directing the Northeastern Illinois Planning Commission, in cooperation with such other defend-

order (CHA Report No. 14, filed September 30, 1974, p. 1; App. 208).

[12] The eleven housing authorities, together with CHA, constitute all of the housing authorities currently operating in the Chicago Housing Market Area, which includes Cook, DuPage, Lake, McHenry, Kane, and Will Counties, Illinois (Br. in Opp. 16, n. 2; Second Supplemental Complaint, p. 2; App. 214).

ants as may desire to participate, to prepare such a metropolitan area-wide plan (*ibid.*).[13]

SUMMARY OF ARGUMENT

The established equitable principle that remedies must be tailored to reflect the nature of the violation has recently been reaffirmed by this Court in *Milliken* v. *Bradley*, 418 U.S. 717, which held that school districts throughout the Detroit metropolitan area could not be consolidated in a metropolitan area-wide plan designed to remedy racial segregation occurring within a single school district. The Court there reasoned that without an inter-district violation, or a violation causing a substantial, segregatory inter-district effect, there is no basis for an inter-district remedy. That reasoning controls this case.

The complaint here alleged only racial discrimination in family housing within the City of Chicago; the district court expressly found that "the wrongs were committed within the limits of Chicago and solely against residents of the City" (Pet. App. 38a). This finding was not reversed on appeal. Moreover, the record contains no showing of any racially segre-

[13] The "best efforts" order against HUD was amended on May 8, 1975, by the district court (Order entered May 8, 1975; App. 221). The order sets forth certain guidelines under which HUD may provide funds for the construction of family public housing units within the City of Chicago. The guidelines provide that a specified percentage of such family public housing shall be constructed in the General Public Housing Area of Chicago, and made available to the respondent class.

gatory inter-district effect resulting from the violation within Chicago, and the court of appeals' speculation concerning the possibility that such segregation stimulated the movement of white residents out of Chicago is wholly unsupported. Thus, under *Milliken*, inter-district relief is improper.

Even if, contrary to our principal argument, the court of appeals were correct in concluding that the decision in *Milliken* turned on practical considerations and on the strength of the tradition of local control over public schools, similar factors dictate the same result here. The tradition of local control over urban land use has been as consistently honored as the local school tradition, and is effectively preserved in the statutes governing HUD's activities at issue here. Moreover, the practical problems of implementing an inter-district public housing remedy are substantial. Thus, the court below erred, not only in its construction of *Milliken*, but also in applying what it considered to be the decisive factors in *Milliken* to the present case.

ARGUMENT

IT IS INAPPROPRIATE FOR A FEDERAL COURT TO ORDER INTER-DISTRICT RELIEF FOR DISCRIMINATION IN PUBLIC HOUSING IN THE ABSENCE OF A FINDING OF AN INTER-DISTRICT VIOLATION.

A. Separate Governmental Districts May Not Be Consolidated For Remedial Purposes In The Absence Of Findings Of Inter-District Violation And Inter-District Effect.

The court of appeals, by remanding this case to the district court for "the adoption of a comprehensive metropolitan area plan" (Pet. App. 59a), has departed from the long-standing rule of federal equity practice that "the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education*, 402 U.S. 1, 16. See also *Brown* v. *Board of Education*, 349 U.S. 294, 300. The state and local agencies that are made subject to the district court's remedial orders by that decision (see p. 12, *supra*), with the exception of CHA itself, have not been implicated in any unlawful discrimination; they have in effect been consolidated for remedial purposes by the court of appeals apparently solely because the court believed that metropolitan area-wide residential desegregation is a desirable goal of social policy.[14] That judicial view of desir-

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[14] Respondents contended in their brief in opposition that without regard to whether the order below was proper as to the state and local agencies that have not followed racially discriminatory public housing practices, "the proposed rem-

able social policy does not, standing alone, justify the award of inter-district relief. *Milliken* v. *Bradley*, 418 U.S. 717.

At issue in *Milliken* was the propriety of an award of inter-district relief as a remedy for the racially discriminatory actions of a single school district. In concluding that the award of inter-district relief was improper, the Court reasoned (418 U.S. at 744-745):

> The controlling principle consistently expounded in our holdings is that the scope of the rem-

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edy is not 'inter-district' as regards HUD" (Br. in Opp. 11). We answered this argument in our reply memorandum, where we explained (Reply Mem. 2; footnote omitted):

> [Respondents'] argument necessarily assumes that the plan can properly be analyzed solely on the basis of its relation to one of the participants, and thus that the same plan might be proper as to HUD even if improper as to the local housing authorities who are necessary participants in the provision of adequate housing. Although HUD collects housing data, makes studies, and attempts to co-ordinate housing developments on an area-wide basis, it nevertheless implements its program through co-operation with local housing authorities, since it has no legal power to coerce them to participate in any co-ordinated metropolitan area-wide plan. Similarly, the State in *Milliken* v. *Bradley* [418 U.S. 717] implemented its plans through local school districts, and, although it had ultimate authority to compel compliance with a metropolitan area-wide plan (Marshall, J., dissenting [418 U.S. at 795-797]), such a plan was inappropriate inter-district relief as to the State as much as to the local school districts. *A fortiori*, here, where HUD implements its plans through local housing agencies, and has no power to compel their compliance with any general plan, a metropolitan area-wide plan is inter-district relief as to HUD as much as it is to CHA and the suburban housing agencies.

> edy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

As Mr. Justice Stewart specifically noted in his concurring opinion in *Milliken* (418 U.S. at 754), the lower courts there erred in awarding inter-district relief, "for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found."

In short, this Court concluded in *Milliken* that separate governmental districts may not be consoli-

dated for remedial purposes in the absence of a finding of inter-district violation or substantial, segregatory, inter-district effect. That decision, while rooted in federal equity principles,[15] may also reflect con-

[15] Respondents err in contending (Br. in Opp. 22-32) that the Court's holding in *Milliken* was based upon considerations of practicality rather than equity. The Court expressly stated that, notwithstanding considerations of practicality, inter-district relief would be appropriate where inter-district violation and effect had been established. 418 U.S. at 744-745; see also 418 U.S. at 754-756 (concurring opinion of Mr. Justice Stewart); 418 U.S. at 769 (dissenting opinion of Mr. Justice White). We nevertheless set forth below (pp. 28-40, *infra*), the practical considerations militating against the award of inter-district relief here.

The equitable principle articulated and applied by this Court in *Milliken* is in fact embodied in Section 602 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, which provides that the sanction for violation of any HUD rule, regulation, or order implementing the non-discrimination requirement of Section 601 of the Act "shall be limited to the particular political entity, or part thereof [found to be in violation] * * * and * * * to the particular program [affected]." Earlier in this litigation, the court of appeals relied upon this statutory provision in holding that the district court had abused its discretion in enjoining HUD from releasing funds under the model cities program, which was not tainted by discrimination, in order to cure the discrimination found in the public housing program. *Gautreaux* v. *Romney*, 457 F. 2d 124, 128 (C.A. 7). The court held that although Section 602 applies to administrative, rather than judicial, remedies, the statutory policy is equally valid for equity courts. That policy is to protect "the innocent beneficiaries of the programs and activities not tainted by discriminatory tactics." 457 F. 2d at 128. In now ordering metropolitan area-wide relief, however, the court of appeals has violated this policy: to the extent that such relief requires suburban housing authorities to provide housing for the respondent class, it could result in the displacement of suburban public housing applicants, who are themselves "the innocent beneficiaries of * * * programs * * * not tainted by discriminatory tactics." See pp. 38-39, *infra*.

stitutional limitations on appropriate judicial remedies where, as here, there has been no finding of either an inter-district violation or an inter-district effect of the violation found.

B. There Was No Finding Here Of Any Inter-District Violation Or Inter-District Effect.

It is arguable whether this Court's opinion in *Milliken* would require a finding of both an inter-district violation and an inter-district effect before inter-district relief may be granted in cases such as this, or whether a finding of either element would suffice. Indeed, the distinction between *both* and *either* may not often be relevant: there may be few, if any, situations in which an inter-district violation would not have an inter-district effect, and it may be similarly rare that an intra-district violation would have substantial segregatory effects outside that district. Moreover, the answer to the both-or-either question may not be the same in all cases. It is possible to imagine cases in which one element might suffice for inter-district relief and others in which, at least arguably, both might be necessary. In any event, the factual setting of this case does not call for a choice between *both* and *either*, for, as we now show, *neither* of the two conditions specified in *Milliken* was met here: there was no inter-district

violation, and the intra-district violation found had no segregatory inter-district effect.

1. *The unlawful racial discrimination found by the courts below related solely to racially discriminatory public housing practices within the political boundaries of the City of Chicago.*

From its inception, this litigation focused exclusively upon racially discriminatory public housing practices within the political boundaries of the City of Chicago. The complaint alleged that HUD was "assist[ing] in the carrying on of a racially discriminatory public housing system *within the City of Chicago*" (Complaint, p. 2; App. 26; emphasis added); it contained no allegation concerning public housing practices outside Chicago. Indeed, respondents have expressly conceded that "the segregation complained of was physically limited to within the City of Chicago" (Transcript of Proceedings of July 24, 1972, p. 71; see also *id.* at 64; App. 72; 67-68). Summary judgment was entered against HUD, based solely upon a determination that "the Secretary exercised [his] powers in a manner which perpetuated a racially discriminatory housing system *in Chicago*, and * * * the Secretary and other HUD officials were aware of that fact" (Pet. App. 32a-33a; emphasis added).[16]

[16] There was, moreover, no finding of active misconduct by HUD. The sole violation of law HUD has been found to have engaged in is that, within the City of Chicago, it funded CHA although aware of CHA's practice of discriminatory site selection for public housing.

The court of appeals, at the time of ordering entry of summary judgment, urged that its holding "not be construed as granting a broad license for interference with the programs and actions of an already beleaguered federal agency" (Pet. App. 36a). On remand, respondents nevertheless requested metropolitan area-wide relief. In connection with that request, respondents offered their Exhibit 11 (App. 144), setting forth data relating to thirteen family public housing projects in the Chicago suburban area; the point made by respondents with regard to this data was not that the suburban housing authorities themselves had followed racially discriminatory practices, but only that existing suburban housing projects did not provide the respondent class with an adequate opportunity to reside in racially integrated neighborhoods (Transcript of Proceedings of November 27, 1972, pp. 50-51; Transcript of Proceedings of November 29, 1972, pp. 375-382; App. 112-113, 197-201).[17] Respondents also argued that a Chicago-only remedy would not achieve substantial residential desegregation in the long run, for, according to at least one projection, every census tract in the City of Chicago would be at least 30 percent black

[17] Exhibit 11 shows that three of the suburban public housing projects are located in predominantly white census tracts and that a fourth involves leased housing located throughout Evanston, a predominantly white suburb (the Exhibit does not indicate in which census tracts that housing is located). The other projects apparently are located in black neighborhoods. See note 19, *infra*.

by the year 2000 (Transcript of Proceedings of November 29, 1972, p. 368; App. 196).

The district court rejected respondent's request for metropolitan area-wide relief as "unwarranted" (Pet. App. 38a). The court correctly pointed out (Pet. App. 38a-39a):

> * * * [T]he wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein. After years of seemingly interminable litigation, plaintiffs now suggest that I consider a metropolitan plan for relief against political entities which have previously had nothing to do with this lawsuit. The factual basis for their request is an opinion of an urbanologist that by the year 2000 the entire geographic area of the City of Chicago will be within the limited public housing area as defined by the judgment order entered on July 1, 1969. This is simply inadequate to support a request to consider imposing obligations upon those who were and are incapable of discriminatory site selection within the City of Chicago.

On appeal from the denial of metropolitan area-wide relief, respondents did not argue that the evidence established an inter-district violation. Instead, relying upon *Bradley* v. *Milliken*, 484 F. 2d 215 (C.A. 6), which had not then yet been reversed by this Court, respondents argued that "the circumstance

that the violation in this case took place within the political boundaries of the City of Chicago affords no reason for limiting the remedy to those boundaries * * *" (Reply Brief to Brief of Appellee HUD, p. 4, filed June 7, 1974). It was not until after this Court decided *Milliken* that respondents first argued that their Exhibit 11 furnished evidence "of segregation in the public housing system in the suburban part of the Chicago housing market area" (Memorandum, p. 11, filed August 14, 1974).

In ordering the adoption of a metropolitan area-wide plan, the court of appeals did not expressly find that either HUD or CHA had engaged in racially discriminatory practices beyond the political boundaries of the City of Chicago. The court did, however, refer to respondents' Exhibit 11 as "evidence of suburban discrimination," although without specifying by whom, or against whom, such discrimination had been committed (Pet. App. 54a).[18]

The court of appeals erred in suggesting that respondents' Exhibit 11 established the commission of

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[18] The court of appeals also relied upon the findings in *Clark* v. *Universal Builders, Inc.*, 501 F. 2d 324 (C.A. 7), certiorari denied, 419 U.S. 1070. Those findings, however, would not support a finding of an inter-district violation in this litigation. *Clark* involved the activities of private real estate developers; neither HUD, CHA, Chicago, nor the suburban governments were parties to that action. In *Clark*, the court judicially noticed "that there exists in Chicago and its environs a high degree of racial residential segregation" (501 F. 2d at 335), but the court did not suggest that the public housing programs of either the city or the suburbs had contributed to, or that HUD and CHA were in any way responsible for, that segregation.

an inter-district violation by either HUD or the suburban housing authorities, the latter of which were not even parties before the court. Exhibit 11 does not, in itself, provide evidence of racially discriminatory housing practices at all. Only one of the suburban projects listed in Exhibit 11 (Chicago Heights) fits within the Chicago pattern, *i.e.*, the construction of public housing in the black neighborhood of a predominantly white municipality; the other projects apparently were constructed either in predominantly black municipalities or in white neighborhoods of predominantly white municipalities.[19] And even if Exhibit 11 constituted evidence that might, in conjunction with other evidence, be probative on the question whether suburban public

[19] Of the thirteen public housing projects in Exhibit 11, three are located in census tracts which in 1970 were less than one-third non-white. A fourth project, in Evanston, Illinois, involves leased housing units located in census tracts whose racial composition is not disclosed—in 1970, Evanston contained seventeen census tracts, only two of which were predominantly black. United States Department of Commerce, *1970 Census of Population and Housing*, PHC(1)-43, Pt. 1, pp. 68-69. Five of the remaining housing projects are located in East Chicago Heights and Robbins, municipalities that have no predominantly white census tracts. United States Department of Commerce, *1970 Census of Population*, Vol. 1, Pt. 15, table 16, pp. 84, 86. Of the remaining four projects, two were completed in 1953 in census tracts whose racial balance at that time is not shown, one is located in a census tract which apparently became predominantly black after the project had been approved and completed, and one project (in the predominantly white municipality of Chicago Heights) was apparently constructed in a census tract which was predominantly black.

housing practices were racially discriminatory, there in fact has been no finding of any inter-district violation.[20] To the contrary, the district court expressly found that "the wrongs were committed within the limits of Chicago and solely against residents of the City" (Pet. App. 38a).

Here, as in *Milliken*, "the Court of Appeals shifted the primary focus from a [city-wide] remedy to the metropolitan area only because of [its] conclusion that total desegregation of [the city] would not produce the racial balance which [it] perceived as desirable" (418 U.S. at 739-740). This approach is incorrect here, as it was in *Milliken*, because the Constitution does not require any particular racial balance; what it does require is racially neutral operation of each politically separate system. That goal may be achieved here without implicating unoffending suburban entities in a coercive metropolitan area-wide plan. "Boundary lines may be bridged where there has been [an inter-district] constitutional vio-

[20] In *Milliken* itself there were some isolated facts that might have suggested the possibility of an inter-district violation. For example, for a period of time students from a predominantly black suburban district had been transferred to a predominantly black city school rather than to predominantly white suburban schools, thereby causing "a segregative effect on the school populations of the two districts involved" (418 U.S. at 750); the State had rescinded the City of Detroit's voluntary desegregation plan (*ibid.*); and the State had approved school sites that caused *de jure* segregation within the City of Detroit (418 U.S. at 751). But in *Milliken*, as here, there was in fact no finding of an inter-district violation.

lation calling for interdistrict relief, but the notion that * * * [such] lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of * * * our country." *Milliken*, *supra*, 418 U.S. at 741.

2. *The discriminatory public housing practices within the City of Chicago had no discernible segregatory inter-district effect.*

The district court below did not find that the discriminatory public housing practices within the City of Chicago had any segregatory inter-district effect. Indeed, there was no evidence suggestive of such an effect. The court of appeals justified its decision in this case by the wholly unsupported speculation that "discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight' phenomenon * * *" (Pet. App. 62a). Such conjecture without evidentiary support is an improper basis for the grant of interdistrict relief. Moreover, the court's speculation here is both illogical and contrary to the evidence.

To the extent that the " 'white flight' phenomenon" reflects a desire on the part of the "fleeing" whites for residential segregation,[21] as a matter of purely

[21] The soundness of this premise is open to question. Respondents' expert witness, Dr. Hauser, explained the " 'white flight' phenomenon" as simply the continuation of a long-term movement, beginning as early as 1840, of higher-income groups away from the central downtown area—first to residential neighborhoods in the outlying areas of the city, then to the suburbs (Transcript of Proceedings of September 28, 1972, pp. 153-154; App. 99-100). As Dr. Hauser further pointed out, this movement involves blacks as well as whites: affluent blacks have been moving out of the central city, and the black population of the suburbs increased by more than 70 percent during the 1960's (Transcript of Proceedings of September 28, 1972, pp. 162-163; App. 104-105).

deductive logic one would have to conclude that CHA's racially discriminatory public housing practices, by contributing to the maintenance of residential segregation in the City of Chicago, actually slowed rather than fostered migration of whites out of the city. The little evidence of record that bears at all on this issue supports this conclusion. Respondents' expert witness, urbanologist Dr. Phillip M. Hauser, testified that, in his view, under the prevailing circumstances "white flight" might have accelerated if more low-income public housing units had been placed in the predominantly white areas of Chicago (Transcript of Proceedings of September 28, 1972, pp. 167-169; App. 107-108).[22] Thus, if there is to be any conclusion drawn from the record, it must be one directly contrary to the speculation of the court of appeals: the placing of public housing projects in predominantly black neighborhoods did *not* encourage the migration

[22] It may be that the effect on urban migratory patterns of a different public housing policy would have been insubstantial. The number of individuals living in all types of public housing in Chicago (about 147,000) is quite small in relation to the total population of the city (3,366,957). United States Department of Commerce, *1970 Census of Population*, Vol. 1, Pt. 15, table 11, p. 55. The dispersal of public housing units throughout the city in a racially neutral manner might therefore have had little or no impact on white migration.

of whites out of the city. There was, therefore, no segregatory inter-district effect.

C. Practical Considerations Also Militate Against The Award Of Inter-District Relief In This Case.

The court of appeals construed this Court's decision in *Milliken* as resting primarily on considerations of practicality, stating that "[w]e understand *Milliken* * * * to hold that the relief sought there would be an impractical and unreasonable over-response to a violation limited to one school district" (Pet. App. 51a). The court then decided that the problems involved in developing and implementing a metropolitan area-wide housing plan "would be insignificant" (Pet. App. 53a) and therefore that inter-district relief could appropriately be ordered here. As we have shown (note 15, *supra*), the court's reading of *Milliken* was incorrect; this Court's emphasis in *Milliken* was on the scope of the wrong to be remedied, not on the administrability of the remedy. In any event, as we now show, the court of appeals erred in its assessment of the practicalities of metropolitan area-wide relief here.

The court of appeals identified the tradition of local control of public schools and the administrative problems involved in cross-district bussing as the practical considerations that rendered an inter-district remedy inappropriate in *Milliken*. Determining that such considerations were absent here, the court remanded for "the adoption of a comprehensive metropolitan area plan" (Pet. App. 59a). But the

tradition of local control over urban land usage—of which public housing is but a small part—is at least as firmly established as the tradition of local control over public schools, and the administrative problems inherent in a judicially devised and enforced metropolitan area-wide plan would in fact be quite substantial.

1. *An inter-district remedy here would be contrary to the statutory scheme, which reserves to the local community the decision whether to participate in federally funded public housing programs.*

A comparison of the facts of this case with those in *Milliken* illustrates the impropriety of inter-district relief here. HUD's involvement in the public housing program is far more limited than the role played by the State of Michigan in the administration of the public schools in *Milliken*. For example, the State had authority to compel local school districts to comply with a metropolitan area-wide plan (418 U.S. at 726, n. 5; see also *id.* at 793-798 (dissenting opinion of Justice Marshall)), whereas HUD has no similar authority over local housing authorities or other local agencies. Nothing in the federal statutes requires any community to participate in public housing programs. To be sure, those programs rest upon federal financial support,[23] and if a community does decide to participate, HUD's approval

[23] Operation of the Michigan public schools similarly was substantially dependent on state support. 418 U.S. at 795, n. 6 (dissenting opinion of Justice Marshall).

will be required with respect to many aspects of the operation of the programs.[24] But the initial decision to participate (with one minor exception; see pp. 33-34, *infra*) remains with local authorities.[25]

Judicial formulation and imposition of metropolitan area-wide relief, in the form of a mandatory inter-district public housing plan, would significantly interfere with this historic local autonomy over public housing. Such relief would also be inconsistent with the legislative intent to preserve this local autonomy that is reflected in the statutes under which HUD operates. See, *e.g.*, H.R. Rep. No. 93-1114, 93d Cong., 2d Sess. 3 (1974); S. Rep. No. 93-693, 93d Cong., 2d Sess. 44 (1974). HUD has a direct responsibility to assure that these statutes are implemented as Congress intended.

Moreover, reluctance to participate in a metropolitan area-wide plan designed to remedy the effects of discrimination in Chicago may lead suburban communities to refrain from applying to HUD for public housing assistance, at least until the plan has been developed, and perhaps thereafter. This could severely impede the implementation of HUD programs de-

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[24] Michigan similarly controls many aspects of the local school systems' operations. 418 U.S. at 795-796 (dissenting opinion of Justice Marshall).

[25] In contrast, it is doubtful whether, under state law, a Michigan community could determine to have no public schools at all. See 418 U.S. at 749, n. 23. And see *Griffin* v. *County School Board*, 377 U.S. 218.

signed to assure that all citizens are adequately housed.

This litigation principally relates to three public housing programs; the low-rent public housing program, the block grant program and the leased public housing program. Under each of these programs the decision whether or not to participate is, either explicitly or as a practical matter, reserved to the local government.

a. *Low-rent public housing.*

The low-rent public housing program was established by the United States Housing Act of 1937, 42 U.S.C. 1401, *et seq.*, and has recently been revised by Section 201 of the Housing and Community Development Act of 1974, 88 Stat. 653. The 1974 Act continues the basic policy of the 1937 Act by declaring that "[i]t is the policy of the United States * * * to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." Section 201 of the 1974 Act, 88 Stat. 653; accord, 42 U.S.C. 1401. This basic policy is implemented by providing federal financial assistance to local housing authorities under annual contribution contracts (42 U.S.C. 1410; Section 201 of the 1974 Act, 88 Stat. 656) that can be entered into only after the participating housing authority has executed a cooperation agreement with the governing body of the locality involved (42 U.S.C. 1415 (7) (b); Section 201 of the 1974 Act, 88 Stat. 658). This requirement insures that there will be a "local determination of the need for low-income housing

* * *." 42 U.S.C. 1415(7); Section 201 of the 1974 Act, 88 Stat. 658.[26]

b. *Block grants.*

Section 103 of the 1974 Act, 88 Stat. 637, creates a block grant program, under which funds are to be distributed to units of local government on the basis of an objective formula weighing such factors as population, poverty, and housing overcrowding. The block grant program is a form of special revenue-sharing that supersedes the urban renewal, model cities, and neighborhood development programs, but it is designed to serve essentially the same purposes as those older programs.

Each application by a local government for block grant funds must be accompanied by a "Housing Assistance Plan," which must (1) survey existing housing and assess the housing assistance needs of lower-income persons, including those expected to reside in the community, (2) state a realistic annual goal for the number of units or persons to be assisted, and (3) indicate the general locations of the proposed housing. Section 104 of the 1974 Act, 88 Stat. 638. The Secretary is required to approve an application for a block grant unless it is (1) "plainly inconsistent" with generally available facts and data, (2)

[26] The local government's cooperation is further necessitated by the fact that payments under an annual contribution contract cannot be made unless the project involved "is exempt from all real and personal property taxes levied or imposed by the State, city, county, or other political subdivisions * * *." 42 U.S.C. 1410(h); Section 201 of the 1974 Act, 88 Stat. 660.

"plainly inappropriate" to meeting the needs identified by the recipient, or (3) not in compliance with applicable law. Section 104 of the 1974 Act, 88 Stat. 639.

c. *Leased public housing.*

The leased public housing program was established in 1965 under Section 23 of the United States Housing Act, 42 U.S.C. 1421b, and was revised by Section 201 of the 1974 Act, 88 Stat. 662. Prior to revision, the program provided for payment of federal financial assistance to local housing authorities that leased units in privately-owned accommodations for subleasing as low-rent housing; the governing statute explicitly stated that the program "shall not apply to any locality unless the governing body of the locality has by resolution approved the application of such provisions to such locality." 42 U.S.C. 1421b(a)(2).

Under the revised program the federal payments are made on behalf of individual tenants, to assist them to occupy new or rehabilitated housing units.[27] The payments may be made either to the local housing authority or, at least in the case of newly constructed units, to the owner. Determinations of tenant eligibility, selection, and assignment are made by the participating housing authority, or, if there is none, by the owner of the unit. Although local governmental approval is no longer explicitly required as a condition of the program's applicability to a

[27] The federal subsidy equals the difference between the fair market rental value of the unit to be occupied and a specific percentage of the tenant's gross income.

locality, local governmental bodies in fact must be substantially involved in the critical decisions affecting the operation of a leased public housing program. This is self-evidently the case when the leasing or subleasing remains, as before, the responsibility of the local housing authority. But it is also true where HUD contracts directly with a private developer, for the developer cannot prepare an acceptable proposal without qualifying under local zoning regulations and arranging for the provision of needed services by local authorities.[28] Thus the practical operation of the leased housing program remains, in a significant degree, under local control.

2. *The administrative problems inherent in a judicially devised and enforced metropolitan area-wide public housing plan would be substantial.*

The court of appeals erred in determining that the practical and administrative problems of implementing a metropolitan area-wide public housing plan would be insubstantial. The fact that, as in *Milliken*, there is no particular comprehensive plan

[28] In localities covered by a housing assistance plan, the Secretary must submit applications for assistance under this program to the local government unit, for consideration of its consistency with the local plan. If, after receiving the local unit's advice, the Secretary finds the application inconsistent with the plan, he must reject the application. Section 213(a) of the 1974 Act, 88 Stat. 674. In localities where no housing assistance plan applies, the Secretary may not approve an application unless he determines, *inter alia*, "that there is or will be available in the area public facilities and services adequate to serve the housing proposed to be assisted." Section 213(c) of the 1974 Act, 88 Stat. 675.

before the Court precludes a full assessment of the problems that will arise.[29] It is possible at this stage, however, to isolate some of those problems.

The relief contemplated by the court of appeals inevitably will subject suburban governmental agencies, none of which has been found to have committed racially discriminatory public housing practices, to substantial financial and administrative burdens.[30] The core of any metropolitan area-wide plan would be the expansion of suburban public housing and the placing of Chicago residents in that housing. It is

[29] Indeed, it is unclear even what geographical area is to be covered. Originally, respondents sought relief covering the Chicago Urbanized Area, which consists of portions of Cook, Dupage, and Lake Counties, and includes six local housing authorities. See Plaintiffs' Proposed Judgment Order, filed September 25, 1972, p. 3; Plaintiffs' Exhibit 11; App. 78, 144. That presumably was the "metropolitan" area contemplated by the court of appeals in ordering the grant of metropolitan area-wide relief. See Pet. App. 52a-53a. But, both in this Court and in the district court, respondents now seek to expand the geographical area involved to include the Chicago Housing Market Area, consisting of six Illinois counties (Cook, Dupage, Kane, Lake, McHenry, and Will) with twelve local housing authorities (Br. in Opp. 11, 16, n. 2; Second Supplemental Complaint, pp. 2, 9-10; App. 214, 218-219).

[30] Respondents suggest inter-district relief is appropriate because here, in contrast with the situation in *Milliken*, the development of a metropolitan area-wide plan has been urged from the outset (Br. in Opp. 31). But the significance of the change in theory in *Milliken* was that it had precluded the suburban parties there from showing that they had committed no acts calling for equitable relief against them. Here the suburban governments and their agencies have not even been parties to the case heretofore; they have had no opportunity to present evidence.

clear that no such plan can be carried out on a purely voluntary basis. A voluntary program encouraged by the district court since 1969 has been "a 100% failure" (see note 7, *supra;* see also Pet. App. 53a). To be effective, therefore, a metropolitan area-wide plan, which presumably would operate within the framework of existing federal housing legislation (see pp. 29-34; *supra*), must perforce coerce the participation of the suburban governments and their agencies. Absent coerced consolidation of separate housing authorities by judicial decree, the suburbs, which have not been shown to be involved in any violation, would be free, as Congress intended, to accept or reject participation in a metropolitan area-wide plan. That coercion cannot be effective if directed solely against HUD; HUD's role is to assist the local political jurisdiction in carrying out its housing plan.

The sheer number of suburban governmental units that would be subjected to judicial supervision would pose an overwhelming problem for the supervising court. There are more than 200 separate cities, villages, and townships in the three-county urbanized area that respondents first defined as the appropriate area for metropolitan relief, and more than 300 such units in the six-county housing market area throughout which they now assert relief to be appropriate (see notes 12, 29, *supra*). United States Department of Commerce, *1970 Census of Population*, Vol. 1, Pt. 15, tables 10, 11, pp. 32-50, 55-57.

Moreover, the construction of new public housing will inevitably entail expansion of many municipal services—not only the sewers, watermains, and electricity lines directly required by the housing units, but also streets, schools, and transportation facilities, as well as the police, fire, health and similar services required by the new residents. Thus, in supervising the development and implementation of a metropolitan area-wide housing plan, the court will have to concern itself with the need to provide a whole range of municipal services in order to make the construction and occupation of the public housing units feasible. While the district court in *Milliken* would have become the *de facto* school superintendent for the entire inter-district area (418 U.S. at 745-746), the district court here, in devising and enforcing a metropolitan area-wide plan, would in significant ways become the master metropolitan government.

Moreover, the costs of providing these additional municipal services can be expected to be not only substantial but, in many cases, beyond the reasonable capability of the affected local government. See Brief of the City of Joliet, Illinois, as *amicus curiae*, pp. 7-8. Yet HUD has no authority to provide these services; they will be the responsibility of the community in which the housing is located. See *James* v. *Valtierra*, 402 U.S. 137, 143, n. 4. By contrast, in *Milliken* the State had ultimate responsibility for the local school systems, which were state agencies. See pp. 29-30, *supra*. The State could thus have more

readily implemented inter-district relief in *Milliken* than HUD can here.

Other problems may be anticipated. The essence of the relief contemplated by the court of appeals is the placing of members of the respondent class, *i.e.*, black residents of Chicago who reside in, or have applied for, CHA public housing projects, in suburban public housing. Accordingly, the district court would be required not only to direct the construction or leasing of new public housing units in the suburbs, but also to determine what proportion of those units are to be allocated to the respondent class. That allocation will directly affect the interests of public housing applicants already residing in the suburbs.[31] Their interests will of course conflict with those represented by respondents; each class will be in direct competition for the scarce resource of public housing. Respondents cannot represent both classes. See Fed. R. Civ. P. 23(a). Cf. *Warth* v. *Seldin*, No. 73-2024, decided June 25, 1975. The procedure under which suburban public housing units would be fairly allocated as between city residents and suburban residents remains an unresolved problem. Cf. *Croskey*

[31] The ratio of public housing units to total population is far lower in the suburbs than in Chicago. Transcript of Proceednigs of November 27, 1972, p. 115; App. 142; Plaintiffs' Exhibit 11; App. 144-146; United States Department of Commerce, *1970 Census of Population*, Vol. 1, Pt. 15, table 11, pp. 55-57. It is thus reasonable to assume that there is in at least some of the suburbs, as in Chicago, a substantial backlog of present or potential applicants for admission to public housing.

Street Concerned Citizens v. *Romney*, 459 F. 2d 109, 113-114 (C.A. 3) (Aldisert, C.J., concurring).

In short the difficulties entailed in effectuating inter-district public housing orders could prove even more intractable than those that arise in the course of enforcing inter-district school desegregation orders. See Note, *The Limits of Litigation: Public Housing Site Selection and the Failure of Injunctive Relief*, 122 U. Pa. L. Rev. 1330 (1974); cf. Recent Cases, *Administrative Law-Urban Renewal*, 85 Harv. L. Rev. 870 (1972).[32] This is not to suggest that the courts should therefore refrain from issuing such orders in appropriate circumstances; it is only to emphasize that in the instant case considerations of practicality reinforce the long-standing equitable

[32] As the court of appeals noted (Pet. App. 54a-56a), HUD officials have advocated metropolitan area-wide planning for public housing. For the most part, such remarks have been directed toward the establishment of cooperative metropolitan efforts. There is, of course, an enormous difference between administrative encouragement of cooperative metropolitan planning and judicial formulation and imposition of an inter-district plan. "Remedial judicial authority does not put judges automatically in the shoes of * * * [local governmental] authorities whose powers are plenary." *Swann* v. *Board of Education, supra*, 402 U.S. at 16. Respondents attempt to derive some support from the fact that the government had not directly opposed the concept of inter-district relief before the district court (Br. in Opp. 4, 18). But the government has always opposed the specific forms of metropolitan area-wide relief sought by respondents, and a fuller review of the matter after the district court entered its order denying such relief led the government in the court of appeals to oppose the award of any inter-district relief in this case.

principle that the relief ordered should be no broader than the violation found.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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CARLA A. HILLS, Secretary of Housing and Urban Development,

Petitioner,

vs.

DOROTHY GAUTREAUX, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

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INDEX

PAGE

QUESTION PRESENTED 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT 3

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. Housing Market Area Relief Against HUD is Neither "Inter-District" under *Milliken* nor Broader than Necessary to Remedy the Effects of HUD's Violation in This Case 19

II. Housing Market Area Relief Against HUD is also Proper under *Milliken* because There is Evidence Here Both of Discrimination by HUD in Suburban Areas and of the Impact of HUD's Discrimination Across City-Suburban Lines 31

III. Because *Milliken* Dealt with Questions of Equitable Remedies, not Substantive Constitutional Law, and Equitable Factors Against Metropolitan Relief in that Case are Absent Here, *Milliken* Does Not Foreclose Housing Market Area Relief Against HUD Apart from the Reasons Given in I and II. In Addition, Housing Market Area Relief Against HUD in This Case is Practical, Judicially Manageable, Consistent with Congressional Policy and Necessitated by Traditional Equitable Considerations 43

CONCLUSION 68

PAGE

Table Of Citations

Cases

Burton v. Wilmington Parking Authority, 365 U.S. 715 4

Cohens v. Virginia, 19 U.S. 264 44

Davis v. Board of School Commissioners, 402 U.S. 33 .....62, 68

Decker v. Korth, 219 F.2d 732 35

Gautreaux v. CHA, 296 F.Supp. 907 .....4, 61

Gautreaux v. CHA, 304 F.Supp. 736 .....4, 10, 33, 46, 61

Gautreaux v. City of Chicago, 342 F.Supp. 827 .....4, 65

Gautreaux v. CHA, 384 F.Supp. 37 .....4, 46

Gautreaux v. CHA, 436 F.2d 306, cert. denied 402 U.S. 922 .....4, 63

Gautreaux v. City of Chicago, 480 F.2d 210, cert. denied 414 U.S. 1144 .....52, 65

Gautreaux v. CHA and James T. Lynn, 503 F.2d 930 .....4, 15, 31, 68

Gautreaux v. CHA, 511 F.2d 82 4

Gautreaux v. Romney, 332 F.Supp. 366 4

Gautreaux v. Romney, 363 F.Supp. 690 .....4, 15

Gautreaux v. Romney, 448 F.2d 731 .....3, 4, 6, 12, 22

Gautreaux v. Romney, 457 F.2d 124 4

Green v. School Board of New Kent County, 391 U.S. 430 37

Hernandez v. Texas, 347 U.S. 475 34

Housing Authority of City of Omaha v. United States Housing Authority, 468 F.2d 1 5

Jones v. Georgia, 389 U.S. 24 34

PAGE

Kennedy Park Homes Assn. v. City of Lackawanna, 436 F.2d 108, cert. denied 401 U.S. 1010 .....51, 52

Keyes v. School District No. 1, 413 U.S. 189 .....26, 34

Lemon v. Kurtzman, 411 U.S. 192 .....44, 45

Louisiana v. United States, 380 U.S. 145 .....4, 26, 29, 30, 50, 62

Milliken v. Bradley, 418 U.S. 717 .....*passim*

NAACP, Western Region v. Brennan, 360 F.Supp. 1006 28

North Carolina State Board of Education v. Swann, 402 U.S. 43 62

Purofied Down Products Corp. v. Travelers Fire Insurance Company, 278 F.2d 439 35

Shannon v. United States Department of Housing and Urban Development, 436 F.2d 809 .....9, 37

Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 .....49, 50

Thorpe v. Housing Authority of Durham, 393 U.S. 268 .....7, 37

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 10

United Farmworkers v. City of Delray Beach, 493 F.2d 799 .....42, 52

U. S. v. City of Blackjack, 508 F.2d 1179, cert. denied —— U.S. ——, 43 U.S.L.W. 3671 .....39, 52

United States v. Connecticut National Bank, 418 U.S. 656 20

PAGE

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment V 2

STATUTORY PROVISIONS

42 U.S.C. §1401 .....5, 9, 60
42 U.S.C. §1402(2) 9
42 U.S.C. §1409 5
42 U.S.C. §1410 7
42 U.S.C. §1415(7) 56
42 U.S.C. §1421b 5, 56
42 U.S.C. §1421b(a)(3) 24
42 U.S.C. §1437 ..... 5, 9
42 U.S.C. §1437a(2) 9
42 U.S.C. §1437c 7
42 U.S.C. §1437f(b)(1) 8, 53
42 U.S.C. §1437f(b)(2) 8, 53
42 U.S.C. §1437g 7
42 U.S.C. §1439(a)(2) 55
42 U.S.C. §1439(c) 55, 57
42 U.S.C. §1441 9
42 U.S.C. §2000d 2, 9, 62
42 U.S.C. §3601 9
42 U.S.C. §3608(d)(5) 2, 9
42 U.S.C. §5301 57
42 U.S.C. §5301(a)(1) 9, 57
42 U.S.C. §5301(c)(6) 10, 57
42 U.S.C. §5304(a)(4)(A) 58

PAGE

48 Stat. 195 7
88 Stat. 633-654 .....14, 54, 55
88 Stat. 654-677 .....54, 55
Ill.Rev.Stat. ch. 67½, §3 65
Ill.Rev.Stat. ch. 67½, §13 8
Ill.Rev.Stat. ch. 67½, §17b 65
Ill.Rev.Stat. ch. 67½, §27c 65

MISCELLANEOUS AUTHORITIES

37 Federal Register 203 (January 7, 1972) 22, 30
24 CFR §200.610 20
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24 CFR §200.710 .....20, 21
24 CFR §1273.103(j)(2) 21
24 CFR §1273.103(j)(3) 24
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PAGE

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PAGE

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HUD News, Remarks Prepared for Delivery by Carla A. Hills, Secretary of HUD, July 2, 1975 15

Report of the President's Committee on Urban Housing, Technical Studies, Vol. II, GPO (1968) 63

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, Secretary of Housing and Urban Development,

Petitioner,

vs.

DOROTHY GAUTREAUX, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit.

BRIEF OF RESPONDENTS

QUESTION PRESENTED

Whether *Milliken* v. *Bradley,* 418 U.S. 717, precludes a federal court from ordering remedial action encompassing a single housing market area against the U.S. Department of Housing and Urban Development when the Department has been found liable for carrying on racial discrimination in federal housing programs in a substantial portion of that market area.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." *U.S. Const. Amend. V.*

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 601, Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §2000d.

"The Secretary of Housing and Urban Development shall . . . administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies [fair housing] of this subchapter." Section 808(e)(5), Civil Rights Act of 1968, 82 Stat. 84, 42 U.S.C. §3608(d)(5).

STATEMENT

Reversing a 1970 order of the district court,* the Court of Appeals for the Seventh Circuit held in 1971 that the U.S. Department of Housing and Urban Development ("HUD") had "violated the Due Process Clause of the Fifth Amendment . . . and also . . . Section 601 of the Civil Rights Act of 1964 . . ." *Gautreaux* v. *Romney*, 448 F.2d 731, 740 (C.A. 7, 1971). The holding was based on the determination that, in conjunction with the Chicago Housing Authority ("CHA"), and by specifically approving and funding sites for housing projects which it knew had been selected in a racially discriminatory manner (*Id.* 737), HUD had intentionally exercised its powers in support of a scheme which "perpetuated a racially discriminatory housing system in Chicago." (*Id.* 739.) Pursuant to "a deliberate policy to separate the races," the discrimination consisted of locating federally subsidized housing almost exclusively in black neighborhoods, thereby to "keep . . . neighborhoods White and to deny admission [to White neighborhoods] to Negroes via the placement of public housing." *Gautreaux* v. *CHA*, 296 F.Supp. 907, 914 (N.D. Ill. 1969); see *Gautreaux* v. *Romney, supra*, 448 F.2d at 740.**

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* Appendix A to the petition for certiorari.

** The discriminatorily located housing consisted of over 30,000 dwelling units on some 64 sites. 296 F.Supp. at 910. Approximately 150,000 persons live in this housing, which CHA calls "a 'city' within a city, in population the second largest in Illinois." (1971 CHA Annual Report, p.3, CHA Quarterly Report No. 5, Attachment No. 5, Record Doc. 274.) CHA also discriminated in tenant assignment. See 296 F.Supp. at 909.

CHA, which was deeply involved in the discrimination, had earlier (in 1969) been held separately liable and subjected to a remedial order.* However, the court of appeals said that its holding as to HUD's liability was not based on the "joint participation" doctrine of *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), but upon the fact that HUD's actions "constituted racially discriminatory conduct in their own right." (448 F.2d at 739.) This determination of HUD's separate liability is the law of the case and is concededly not now at issue before this Court. (Petition for certiorari, p.5, n.4.) Thus, the remedial duty "so far as possible [to] eliminate the discriminatory effects of the past," *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965), became an obligation of HUD separate and distinct from CHA's parallel duty.

Under the federal housing programs within which the HUD-CHA discrimination occurred, the role of local public agencies such as CHA, though important, is sub-

* Cases against CHA and HUD were filed simultaneously but separately. On the district court's own motion proceedings against HUD were stayed pending disposition of the CHA suit. The two cases were later consolidated on HUD's motion, their present posture. The major decisions in the case to date are: (1) the original judgment order against CHA and a modification of it—296 F.Supp. 907; 304 F.Supp. 736; 436 F.2d 306, cert. denied 402 U.S. 922; (2) the determination of HUD's liability and proceedings respecting relief against it—district court decision of September 1, 1970 (unreported; Appendix A to the petition for certiorari); 448 F.2d 731; 332 F.Supp. 366; 457 F.2d 124; 363 F.Supp. 690; 503 F.2d 930; (3) proceedings setting aside the Chicago City Council's veto power over CHA site selection—342 F. Supp. 827; 480 F.2d 210, cert. denied, 414 U.S. 1144; and (4) reference to a special master to identify reasons for delay in implementing earlier orders and to make recommendations—384 F.Supp. 37; 511 F.2d 82; district court decision entered May 8, 1975 (unreported; App. 221).

ordinate to the ultimate supervisory power and obligation of HUD to administer those programs to achieve national housing objectives.* While maximum responsibility is to be vested in local agencies, subject to giving "due consideration to accomplishing" and "consistent with" federal objectives, 42 U.S.C. §§1401, 1437, HUD possesses "ultimate supervision and authority in carrying out the objectives of the Housing Act" and "ultimate responsibility for policy . . . to achieve uniformity in fulfilling the objectives of the Act . . ." *Housing Authority of City of Omaha* v. *United States Housing Authority,* 468 F.2d 1, 7 (C.A. 8, 1972).**

* The four forms of federal housing programs involved here are all established by the United States Housing Act of 1937, as amended, 42 U.S.C. §1401 et seq., and are familiarly known as the "conventional," "turnkey," "leased housing" and "housing assistance" programs, respectively. 42 U.S.C. §§1409 et seq., 1421b, 1437f. All involve the use of federal funds to provide "subsidized" housing for persons of low income, the precise form of the subsidy varying from program to program. In very general terms, conventional housing is typically constructed and owned by a public, state-created housing agency, turnkey housing is privately constructed but owned by a public agency and leased housing is privately owned and leased by a public agency, while under the housing assistance program housing may be either privately or publicly owned and is leased by a beneficiary family whose rent is partially paid with public funds. The initial remedial orders against CHA and HUD applied to the first three programs, the only ones then in existence. After the housing assistance program was established by the Housing and Community Development Act of 1974, a further remedial order was entered by the district court on May 8, 1975, relating to that program. (App. 221.)

** Opposing certiorari in *Omaha,* the Government said that the court of appeals "correctly determined that Section 1401 does not restrict HUD's 'responsibility and

Consistent with its "ultimate responsibility," HUD's role in the administration and financing of federal housing programs is pervasive. In its 1971 opinion the court of appeals said:

> "[T]here can be no question that the role played by HUD in the construction of the public housing system in Chicago was significant. The great amount of funds for such construction came from HUD. . . . The [HUD] Secretary's trial brief acknowledged that 'in practical operation of the low-rent housing program, the existence of the program is entirely dependent upon continuing, year to year, Federal financial assistance.' . . . Moreover, within the structure of the housing programs as funded, HUD retained a large amount of discretion to approve or reject both site selection and tenant assignment procedures of the local housing authority. HUD's 'Annual Contributions Contract' contained detailed provisions concerning program operations and was accompanied by eight pages of regulations on the subject of site selection alone." *Gautreaux* v. *Romney, supra,* 448 F.2d at 739.

** (Continued)
concomitant authority to protect and further the purposes and objectives of the Act . . .'" (Brief for the Federal Respondents in Opposition to Certiorari, No. 72-793, p.9.) HUD's Eighth Circuit brief said it was "clear that HUD possesses authority to regulate matters involving broad national policy." (HUD's Brief in the Eighth Circuit, Nos. 72-1102 and 72-1185, p.21.) It also said that the legislative history of the so-called "local autonomy" amendment to Section 1401 (which provides that maximum responsibility in the administration of the low rent housing program should be vested in local public housing agencies, with due consideration to accomplishing the objectives of the law) demonstrated that Congressional concern "centered around budget control, audits, rents and eligibility requirements," and that even in these areas "far less than full control was given to the local housing authorities." (*Id.* 19, 25.)

This quotation does not fully reflect the scope and depth of the federal financial and administrative role. Originally the subsidized housing program was exclusively federal.* When the law was amended to provide for local participation it still called for the full capital costs of the program to be borne by the federal government, and this remains true today. 42 U.S.C. §§1410, 1437c. In recent years the federal government has in addition paid a portion of operating expenses. 42 U.S.C. §§1410(a), 1437g. The pervasive nature of the federal administrative role is illustrated not only by the Annual Contributions Contract referred to by the court of appeals (Part One of HUD's contract with CHA is 22 single-spaced typewritten pages, plus numerous amendments, and Part Two is a 56 page printed booklet containing 97 sections, each on a distinct subject), but by voluminous regulations which HUD issues from time to time, of which the eight pages on site selection noted by the court of appeals are only a part, and by additional requirements which according to HUD "are the minimum considered consistent with fulfilling Federal responsibilities." *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268, 275 (1969). (The CHA contract is Record Item 20 in Appeal No. 71-1073, part of the Record here.)

Recognizing this pervasive federal role Illinois law, which otherwise vests in the Illinois Department of Local Government Affairs supervisory powers over local housing agencies, exempts from such powers a housing project

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* 48 Stat. 195. For a brief history see Lawrence M. Friedman, *Government and Slum Housing* (Rand McNally 1968), pp. 99-104. A lengthier account appears in Charles Abrams, *The Legal Basis for Reorganizing Metropolitan Areas in a Free Society,* 106 Proceedings of the American Philosophical Society 177 (1962).

financed in whole or in part by the federal government "so long as such project is supervised or controlled by the federal government . . ." Ill.Rev.Stat. ch. 67½, §13.

HUD's role was further enlarged by a 1974 amendment to the United States Housing Act of 1937. Whereas prior to the amendment federally subsidized housing under the Act was provided only through the joint action of HUD and local housing agencies, the amendment conferred additional powers upon HUD to provide such housing without the participation of local agencies. HUD may now contract directly with private developers for the construction and substantial rehabilitation of housing, 42 U.S.C. §1437f(b)(2), and with private landlords for the leasing of existing housing units (not newly constructed or substantially rehabilitated) to eligible families where a local housing agency does not exist or for any reason does not carry on this "existing housing" program, 42 U.S.C. §1437f(b)(1).* The Conference Committee Report says that under the 1974 amendments "primary responsibility" for program administration is placed in the Secretary of HUD (Compilation of the Housing and Community Development Act of 1974, Subcommittee on Housing of the House Committee on Banking and Currency, 93rd Cong. 2d Sess., p.312), and HUD has indicated that its major emphasis in providing subsidized housing in the future will be to utilize the arrangements authorized by the 1974 amendments. (Hearings, Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong. 1st Sess., Part 5, April 14, 1975, pp. 119-20.)

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* HUD's "existing housing" regulation provides that if no local housing agency is organized or "able and willing" to implement the relevant provisions of the statute for a particular area, HUD may do so itself. 24 CFR §1275.104(b).

In exercising these extensive housing powers HUD is governed by national housing objectives found in a number of statutes which are to be read *in pari materia* with each other. *Shannon* v. *United States Department of Housing and Urban Development*, 436 F.2d 809, 817 (C.A. 3, 1970). The most general policy declarations are: "[T]he realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . .," in pursuit of which objectives all agencies having housing powers "shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act . . .", 42 U.S.C. §1441; and, "[T]o provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. §3601. It is of course a particular national objective to remedy the housing shortage for families of low income, 42 U.S.C. §§1401, 1437, that is, families "who cannot afford to pay enough to cause private enterprise in their locality or metropolitan area to build an adequate supply of decent, safe, and sanitary dwellings for their use." 42 U.S.C. §§1402(2), 1437a(2).

The specific national housing objectives that are of special relevance in this case are: to prevent discrimination in federal housing programs, 42 U.S.C. §2000d; to administer federal housing programs in a manner affirmatively to further fair housing, 42 U.S.C. §3608(d)(5); to reduce the concentration of persons of lower income in central cities, 42 U.S.C. §5301(a)(1); and to foster

the spatial deconcentration of housing opportunities for persons of lower income. 42 U.S.C. §5301(c)(6).*

Since the racial discrimination in this case had consisted of confining blacks to established black neighborhoods and preventing them from entering white neighborhoods via subsidized housing by placing such housing almost exclusively in black areas, the essential elements of the remedial order entered in 1969 against CHA (while proceedings against HUD remained stayed on the district court's own motion) were: (1) to require that future subsidized housing be located predominantly in white neighborhoods of Chicago; and (2) to require that a proportion of such future housing (50%) be made available to the plaintiff class. 304 F.Supp. 736. The order also provided that at CHA's option up to one-third of the future housing (following the initial 700 dwelling units) might be located in the suburban portion of Cook County outside Chicago. 304 F.Supp. at 739. (Except for a small portion of O'Hare Airport which is in DuPage

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* In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972), this Court quoted one of the Senate sponsors of 42 U.S.C. §2000d as follows:

> "[T]he reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'"

The Second Annual Report on National Housing Goals of the President says:

> "It is imperative to reverse the trend toward a society that is becoming geographically divided not only on a racial basis but on economic and social bases as well. There must be an end to the concentration of the poor in land-short central cities, and their inaccessibility to the growth of employment opporunities in suburban areas." House Document No. 91-292, 91st Cong. 2d Sess., U.S. Govt. Printing Office, April 2, 1970, pp. 20-21.

County, Chicago is bounded by Cook County on the North, West and South and by Lake Michigan on the East.) Pursuant to such authorization CHA later contracted with the Housing Authority of Cook County for "housing in areas outside the municipal boundaries of the City of Chicago . . . to house low income families who are residents of Chicago and who are certified by CHA to be eligible for housing." CHA Quarterly Report No. 5, Attachment No. 14, p.1, Record Doc. 274. The contract was submitted to and approved by HUD. *Id.*, Attachment No. 11.

Following entry of the 1969 remedial order against CHA plaintiffs resumed the theretofore stayed proceedings against HUD. They immediately sought relief with respect to that portion of federal housing subsidy funds allocated by HUD for use within the Chicago metropolitan area. HUD urged dismissal of the action against it for the reason, among others, that the voluntary remedial steps it was then taking in the metropolitan area would supposedly achieve the needed remedy.* It said that since the entry of the remedial order against CHA it had focused on three objectives: improving the environment for Chicago public housing residents, providing additional federally subsidized housing in Chicago, and

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* Plaintiffs' motion for summary judgment against HUD sought relief relating to "that portion of HUD's resources which the Secretary in his discretion determines to allocate to the Chicago housing market area." (Pet. App. 15a.) For a discussion of the term "housing market area," see Part I of the Argument, *infra*. HUD's argument was captioned, "The Plaintiffs' Objectives will be More Readily Achieved by the Voluntary Efforts of the Defendant (HUD) than by the Coercion of a Judicial Decree." HUD Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 22, Record Item 52 in Appeal No. 71-1073, part of the Record in this case.

providing additional federally subsidized housing in the Chicago suburban area. (Affidavit of Don Morrow, June 8, 1970, p. 1, Record Item 52, Appeal No. 71-1073, App. 44.) Respecting the third objective HUD advised the district court as follows:

> "Pursuit of the third objective of building in the suburbs has called for a multiplicity of actions. One level of our activity has been to help identify sites for low rent housing . .
>
> The development of the criteria was done in cooperation with the CHA and the Cook County Housing Authority . . .
>
> The Northeastern Illinois Planning Commission has agreed to undertake an identification of the locations within the Chicago metropolitan area where low and moderate income housing should be built . . . using the criteria . . ." (*Id.* 2-3, App. 46-47.)

Finding the "putative limits of its powers . . . effectively circumscribed" (Pet. App. 16a), the district court granted HUD's motion to dismiss the complaint for jurisdictional reasons and for failure to state a claim for relief. (*Id.* 7a-8a, 13a.) The court of appeals then reversed this judgment in favor of HUD and remanded for a determination of appropriate relief, saying that, while extremely important, the question of relief was not before it. (448 F.2d at 734.) Specifically, the court declined to express a view as to whether the requested relief involving the Chicago metropolitan area was "either necessary or appropriate." (*Id.* 736.)

On remand the district court called upon the pa ties to submit proposed comprehensive remedial plans, including "alternatives which are not confined in their scope to the geographic boundary of the City of Chicago." (Order of December 23, 1971, App. 50.) In the ensuing

proceedings each of the parties stated that only metropolitan relief would be effective. Congressional testimony of then HUD Secretary George Romney, submitted to the district court by HUD, read:

> "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community. The City and the suburbs together make up what I call the 'real city.' *To solve problems of the 'real city' only metropolitan wide solutions will do.*" (Statement of George Romney, Appendix A, pp. 15-16, to HUD Memorandum, Record Doc. 283, emphasis supplied.)

In addition HUD joined the respondents in specifically representing to the district judge that a metropolitan remedy was "desirable" and a concept it "endorse[d]," and that it would be willing to participate in the development of such a remedy if state and local governments would "take the lead." (Transcript of Proceedings, Feb. 22, 1972, pp. 4-7, App. 62-64)* CHA likewise took the position that only a metropolitan remedy would be effective:

> "CHA fully agrees that public housing must be metropolitan in nature, and not confined to the City of Chicago. It has so stated on numerous occasions before this court. It has offered testimony that *a dispersal program for public housing will not work unless it is operated on a metropolitan basis.*" (CHA Memorandum, p. 27, Record Doc. 167, emphasis supplied.)

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* HUD later said it was "by no means clear" that a metropolitan remedy was necessary, but it then subsequently reaffirmed "the desirability of a metropolitan wide plan," explaining that its previous statement was only intended to raise "various legal objections to the particular plan plaintiffs have proposed . . ." (HUD Memorandum, pp. 7-10, Record Doc. 310.)

In response to the district court's request for remedial proposals plaintiffs submitted a suggested form of metropolitan judgment order. (Plaintiffs' Proposed Judgment Order, September 25, 1972.) While declining to submit a comprehensive remedial plan HUD advised the district court that its "best thinking" was represented by an agreement it had entered into with CHA and the City of Chicago calling for a variety of actions to be taken by the three signatory parties. (Response of George W. Romney, April 26, 1972, pp. 2-3.) Among other metropolitan actions the agreement called for the development by CHA in cooperation with the Cook County Housing Authority of approximately 500 dwelling units outside the boundaries of Chicago, and for CHA to lease approximately 600 additional dwelling units throughout the metropolitan area. (Plaintiffs' Exhibit No. 18, pp. 7-8, to Hearing of November 27-29, 1972. App. 152-53.) Nonetheless, HUD proposed a judgment order which essentially directed it to cooperate with CHA in implementing remedial orders previously entered, and involved no metropolitan relief other than "cooperation" as to the optional Cook County portion of the 1969 order against CHA. (Appendix A to Response of George W. Romney, April 26, 1972.)

In the evidentiary hearing held thereafter on the relief to be granted against HUD, plaintiffs further showed the need for metropolitan relief while CHA offered no evidence at all and HUD's evidence was confined to the asserted lack of federal housing subsidy funds then available. (Transcript of Proceedings, November 27-29, 1972, pp. 367, 330-48. See 503 F.2d at 934.*) Summarizing the

* The lack of subsidy funds was remedied by the passage of the Housing and Community Development Act of 1974. Public Law 93-383; 88 Stat. 633, *et seq.* HUD estimates that up to 400,000 dwelling units will be federally

foregoing and other statements of the parties and evidence on the subject, the couurt of appeals later said:

> "[T]he parties are in agreement that the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work . . . All of the parties, the Government officials, the documentary evidence, the sole expert and the decided cases agree that a suburban or metropolitan area plan is the *sine qua non* of an effective remedy." *Gautreaux* v. *CHA and James T. Lynn*, 503 F.2d 930, 937, 938-39 (CA 7, 1974).

Notwithstanding this unanimity of the parties as to the need for metropolitan relief, the district court ultimately declined to consider any further such relief. Instead it entered HUD's proposed, largely non-metropolitan judgment order. (363 F.Supp. 690, 691.) On appeal the district court's ruling against considering additional metropolitan relief was reversed and the case was again remanded "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken* v. *Bradley*." (503 F.2d 930, 940.) This is the decision now here for consideration on HUD's petition for certiorari. CHA has not sought review.

* (Continued)

subsidized during the fiscal year beginning July 1, 1975, approximately 300,000 of which will be new or substantially rehabilitated. (HUD News, Remarks Prepared for Delivery by Carla A. Hills, Secretary of HUD, July 2, 1975.)

SUMMARY OF ARGUMENT

Unlike *Milliken* v. *Bradley,* in which no federal program or agency was involved and which dealt with the proposed consolidation of local school districts, this case involves a subsidized housing program: (1) which is established by federal, not local, law; (2) which is financially supported by federal, not local, funding; (3) which is pervasively (though not exclusively) federal in administration; (4) in which, separately and independently of the established liability of local officials, the federal administering agency has been adjudicated liable for its own acts of racial discrimination in its conduct of the housing program; and (5) in which the proposed remedial action could be limited to the federal agency and, even if extended to local agencies, would not involve the consolidation of any local governmental units.

In that context we first accept *arguendo* the Government's view that regardless of practical and other equitable considerations *Milliken* precludes inter-school district relief in every case that does not involve inter-school district segregative acts or effects, and we show that for each of two independent reasons metropolitan relief against HUD is not inconsistent with *Milliken.* The first of the two reasons is that in all four of the housing programs involved here HUD defines and employs a "housing market area" geographic unit as the relevant geographic area within which to address the problem of the concentration of minority housing opportunities presented by this case. Relief against HUD which encompassed the housing market area would therefore not be "inter-district" under *Milliken* and would not be broader than necessary—by HUD's own determination—to remedy the effects of HUD's racial discrimination in this case. (Part I of the Argument.)

The second and separate reason is that there is evidence in this case of racial discrimination by HUD in the suburban portions of the housing market area as well as evidence (in the form of acknowledgments by HUD) that the effects of the type of discrimination practised in this case spread across city-suburban lines. Thus, even if relief against HUD which encompassed the portion of the housing market area outside of Chicago were to be viewed—improperly, we think—as "inter-district" relief, *Milliken's* requirements for such relief (under the Government's interpretation of that case) would be satisfied here. (Part II of the Argument.)

Finally (in Part III of the Argument), we explain why we do not believe the Government's reading of *Milliken* is correct. We then go on to show, under what we view as a proper interpretation, that apart from the reasons already discussed *Milliken* does not foreclose metropolitan relief against HUD for three reasons: (1) Equitable factors similar to those that were decisive againt metropolitan relief in *Milliken*—a deeply rooted tradition of local control, serious problems atteding large scale transportation of students, an array of other problems attending the consolidation of local school systems, and the likelihood that a complete restructuring of local school district laws would be entailed—are wholly absent here, as are the coercive and "racial balance" aspects of the relief proposed there; (2) The practical considerations said by the Government to militate against metropolitan relief in this case—local control over land use, the federal statutory scheme, costs and burdens supposedly to be entailed, and problems attending the allocation of remedial housing—in fact present no obstacles to such relief against HUD; and (3) Metropolitan relief against HUD would be practical, judicially manageable and consistent with Congressional

policy, and is necessitated by traditional equitable principles.

(The Government's brief deals extensively—indeed, almost exclusively—with the separate question of metropolitan relief against local housing agencies. We therefore also show in Part III that for these same reasons extending metropolitan relief to such agencies is not foreclosed by *Milliken*. However, since CHA has not sought review and the pleadings respecting other housing agencies have not yet joined issue, we do not believe that the separate question of extending metropolitan relief to local housing agencies is now properly before the Court.)

ARGUMENT

I. Housing Market Area Relief Against HUD is Neither "Inter-District" under Milliken nor Broader than Necessary to Remedy the Effects of HUD's Violation in this Case.

The Government contends that metropolitan relief in this case would breach the equitable principle that the nature and extent of a violation determine the scope of the remedy for its effects. Among the reasons why that contention is incorrect is the Government's erroneous assumption that metropolitan relief against HUD in this case would be "inter-district" relief under *Milliken* v. *Bradley*. In fact, HUD has determined that a single "housing market area" is the proper geographic area within which to address the problem of minority concentration presented here—and, indeed, is the proper area to use in responding to the adjudication against it in this very case. As we show in this Part I, relief against HUD that encompasses the area HUD thus itself defines and employs as the relevant geographic area is neither "inter-district" nor broader than necessary, by HUD's own determination, to remedy the effects of HUD's violation in this case.

In its administration of federal housing programs HUD employs a geographic unit, the "housing market area," which is the area within which residents of a population center look for, or are in the "market" for, housing. In all four of the housing programs involved here HUD employs the housing market area as the relevant

geographic area within which to address the problem of minority concentration.*

HUD defines the housing market area as "the geographic entity within which nonfarm dwelling units are in mutual competition." (Department of Housing and Urban Development, Federal Housing Administration, *Techniques of Housing Market Analysis,* January 1970, p. 10.) Since housing market area boundaries "normally encompass those geographical areas in which there is an identifiable relationship between place of work (non-farm) and place of residence" (Department of Housing and Urban Development, *Urban Housing Market Analysis,* 1966, p. 5), a housing market area usually extends beyond city limits. Generally, as in the case of Chicago, it is identical with the Standard Metropolitan Statistical Area.**

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* HUD employs the market area for other purposes as well, e.g., to define the geographic area within which developers of subsidized housing must affirmatively market their housing to minority groups, 24 CFR §200.610, and to determine the need for low-income housing, 24 CFR §200.710 (pp. 233-34).

** "The housing market area usually extends beyond the city limits, regardless of the magnitude of the market under consideration. . . For practical purposes, the Standard Metropolitan Statistical Area may be delineated as the housing market area in those cases where an SMSA has been established." (Department of Housing and Urban Development, Federal Housing Administration, *Techniques of Housing Market Analysis,* January 1970, pp. 12-13.)

Standard Metropolitan Statistical Areas "are prepared by of Office of Management and Budget to determine areas of economic and social integration, principally on the basis of the commuting patterns of residents." *United States* v. *Connecticut National Bank,* 418 U.S. 656, 670 (1974).

In 1972 HUD promulgated regulations, called "Project Selection Criteria," which established mandatory criteria to be used by HUD in evaluating and processing housing proposals under the United States Housing Act of 1937.* The criteria "represented the first major effort by the Federal Government to consider systematically the social and environmental impart of subsidized housing on the nation's communities." (Department of Housing and Urban Development, *Implementation of HUD Project Selection Criteria for Subsidized Housing: An Evaluation,* December 1972, Foreword.) They "grew out of a general disenchantment with policies which largely ignored such considerations; but more specifically, they were developed in response to the mandate of the 1968 Civil Rights

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** (Continued)

"The Chicago, Illinois, Housing Market Area is defined as being coterminous with the six-county Chicago Standard Metropolitan Statistical Area (SMSA), which, as currently defined, consists of Cook, DuPage, Kane, Lake, McHenry, and Will Counties, Illinois." (Department of Housing and Urban Development, *Analysis of the Chicago, Illinois Standard Metropolitan Statistical Area Housing Market,* June 1966, p. 1.)

* 24 CFR §200.700, *et seq.* As published in the Federal Register the criteria are in evidence as Plaintiffs' Exhibit No. 16 to the hearing of November 27-29, 1972. With certain exceptions for proposals involving small numbers of units the Project Selection Criteria applied initially to the conventional, turnkey and leased housing programs, as well as to several other housing programs established under laws other than the United States Housing Act of 1937. 24 CFR §200.710 (p. 233). They also appear to apply to the housing assistance program created in 1974. See 24 CFR §§1273.103(j)(2), 1275.103(i), 1277.103(j)(2). In addition a similar requirement respecting minority concentration appears in a separate regulation governing new housing provided under this program as discussed in the text below.

Act and several court decisions requiring the Department of Housing and Urban Development to assess the impact of its decisions on areas of minority concentration, as well as the availability of housing opportunities in non-segregated areas for minority citizens." (*Ibid.*) Among the decisions referred to is the court of appeals decision in *Gautreaux* v. *Romney, supra,* 448 F.2d 731. (Id. 13-15.)*

The purpose of the criteria is to eliminate "unacceptable" proposals for subsidized housing and to assign priorities in funding "to assure that the best proposals are funded first." 37 Fed. Reg. 203 (1972). HUD thus uses the Project Selection Criteria as a means of determining which housing proposals to fund (and in what order) and which to reject. A proposal must receive a rating of "superior" or "adequate" on each criterion to be funded

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* Further explaining the background of the criteria HUD quotes then Secretary Romney as follows:

> "[I]f there is one lesson we have learned in our national experience with Federally assisted housing, it is that the concentration of large numbers of institutional-style units in areas of minority racial concentration produces undesirable results. It fosters the social isolation of the poor and minority groups. In many instances, it also deprives the poor and members of minority groups from living within a reasonable distance of jobs. When such concentrations have occurred in central cities, they have contributed to the physical and social deterioration of the city, and have hastened the exodus from the cities of the more stable elements of society.
>
> "Accordingly, it seems obvious that if the nation's housing goals are to be met without further exacerbation of the problems resulting from past policies, the Federally subsidized housing of the future must be designed and located differently than has been the case in the last thirty years." (*Id.* 7.)

at all; a proposal that receives a rating of "poor" under any criterion will automatically be rejected. (*Ibid.*)

One of the criteria, entitled Minority Housing Opportunities, deals directly with the issue of minority concentration.* The stated objectives of that criterion are "To provide minority families with opportunities for housing in a wide range of locations," and "To open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." (*Id.* 206.) Compliance with the Minority Housing Opportunities criterion is specifically measured in terms of the housing market area. For example, a "superior" rating is earned if a proposed project "will be located . . . [s]o that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racially mixed . . ." (*Ibid.*) An "adequate" rating will be given a project located in an area of minority concentration but which is necessary to meet housing needs which "cannot otherwise feasibly be met in that housing market area." (*Ibid.*)

In adopting the Project Selection Criteria HUD specifically rejected suggestions that housing market areas be

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* Although as ultimately promulgated the Project Selection Criteria also dealt with matters other than racial concentration and the effects of past discrimination, according to HUD the origins of the criteria may be traced to the racial concentration issue and their development was "in large part" intended to reflect the requirement of the 1968 Civil Rights Act that HUD administer its programs in a manner affirmatively to further the fair housing policies of Title VIII of that Act. (*Implementation of HUD Project Selection Criteria for Subsidized Housing: An Evaluation, supra,* pp. 8-9.)

defined to coincide with the boundaries of local political jurisdictions:

> "It was suggested that the term 'housing market area,' used several times in the criteria, should be defined to coincide with boundaries of local political jurisdictions. It was also suggested that certain parts of housing market areas should be allotted housing funds irrespective of ratings on the criteria. The Department has declined to adopt these suggestions because *housing market areas often are independent of arbitrary political boundaries* and allotments to certain parts of those areas could result in the Department's approving projects which would be less than the best that could be created for the people of each housing market area."(*Id.* 203, emphasis supplied.)

Additional regulations governing new housing under the housing assistance program established in 1974 contain location criteria similar to the Minority Housing Opportunities criterion of the Project Selection Criteria. They provide that sites for newly constructed housing shall not be located in areas of minority concentration unless sufficient comparable housing opportunities for minority families exist outside such areas or there are overriding housing needs "which cannot otherwise feasibly be met in that housing market area." 24 CFR §1273.103(j)(3).

HUD has also adopted the housing market area approach in interpreting the statutory authority for the leased housing program. The statute requires that leased housing be "calculated to meet the total housing needs of the community in which they [dwelling units] are located." 42 U.S.C. §1421b(a)(3). In approving CHA's contract with the Cook County Housing Authority HUD concluded that in using the term "community" Congress intended to refer not to a local political unit but to the housing market area:

> "[W]e have concluded that Section 23 [42 U.S.C. §1421b] units in a given 'locality' may be used to meet housing needs beyond the political boundaries of the locality . . . [W]hat Congress intended by the term 'community', as used in Section 23(a)(3) [42 U.S.C. §1421b(a)(2)], was not a political subdivision, as such, but the housing market area in which the housing to be leased is located." (Attachment No. 11, p. 1, to CHA Report No. 5, Rec. Doc. 274.)*

In short, HUD has determined that the housing market area is the proper geographic area for addressing the issue of deconcentrating minority housing opportunities to carry out Congressionally established fair housing policy. Indeed, the Project Selection Criteria reflect a determination by HUD that the market area is the proper area for use in responding to the adjudication against it in this very case. It is appropriate, therefore, that a remedial order against HUD encompass the area HUD itself defines and employs as relevant to the issue of "open[ing] up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." Respecting HUD's powers the Chicago Housing Market Area is the relevant "district."

This, we submit, should be dispositive of this case. Nothing in *Milliken* v. *Bradley* compels an equity court to ignore these facts and restrict its remedy as it applies

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* HUD has also interpreted state statutes relating to local housing agencies as reflecting a determination that "the city and its surrounding area comprise a single 'locality' for low-rent housing purposes." (Plaintiffs' Exhibit 13, p. 304.)

to HUD's funding and administrative powers to a limited portion of the housing market area. In *Milliken* the Court did not deal with a geographic area, administratively determined by the defendant agency to be the appropriate area for relevant program purposes, that extended across local political boundary lines. Neither did the Court there confront a situation in which a defendant federal agency already possesses and exercises authority to administer federal programs to achieve Congressionally mandated national housing objectives on such an areawide geographic basis. In this case, therefore, a decree respecting HUD's powers that encompassed the housing market area would not involve "inter-district" relief under Milliken.*

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* *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), is a closer analogue to this case than *Milliken*. In *Keyes* the Court held that relief throughout a school district was proper upon a showing of deliberate racial discrimination in a substantial portion of the district and unexplained segregated conditions in other portions. These requirements are met here as to the Chicago Housing Market Area—the first by the uncontested adjudication of HUD's liability, the second by plaintiffs' Exhibit No. 11 showing segregated conditions in suburban portions of the market area. Although *Keyes* left for determination on remand whether the school district could be divided into "separate, identifiable and unrelated units," 413 U.S. at 203-04, here the housing market area is defined as the area within which dwelling units are in "mutual competition." By definition, therefore, the market area is not so divisible.

The Government contends that Exhibit 11 does not show *de jure* suburban discrimination by HUD (a matter discussed in Part II below), but no contention can be made that the exhibit fails to show segregated conditions. That there were no allegations in the complaint respecting suburban areas does not of course preclude a court of equity from considering the suburban evidence as it bears on effective relief. See *Louisiana* v. *United States*, *supra*, discussed in the text *infra*.

Virtually the only comment in the Government's brief on the housing market area as the relevant "district" for relief against HUD is the contention that a proposed remedy cannot be "proper" as to HUD if it is "improper" as to local housing authorities, that if metropolitan relief would be "inter-district" as to such authorities it must be "inter-district" as to HUD as well. (Br. 15-16, n.14.)* The Government's argument is unpersuasive on two grounds.

First, it rests on the erroneous assertions that "local housing authorities . . . are necessary participants in the provision of adequate housing" and that "HUD implements its plans through local housing agencies." (Br. 16, n.14.) We have pointed out in the Statement above, and the Government has previously acknowledged (Reply Mem. 2, n.1), that HUD is now empowered to contract directly with private developers for newly constructed and substantially rehabilitated subsidized housing *to the exclusion of any local housing authority participation*, and that it may itself administer the existing housing program wherever it determines that a public housing agency is for any reason unable or unwilling to implement that program. Thus, even if *Milliken* barred metropolitan relief as to local housing agencies, such relief would not on that account be either barred or futile respecting HUD's independent powers—and independent remedial obligation—to provide housing by direct contract with private developers and landlords without the participation of local housing agencies, powers which HUD exercises under its own existing regulations on a market area basis with respect to the matter of minority concentration.

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* The Government's separate contention that metropolitan relief confined to it would be impractical is discussed in Part III *infra*.

Second, even as to the older housing programs under which subsidized housing is provided by the joint action of HUD and local housing agencies, nothing prevents the operation of a remedy which would deal with the manner in which HUD exercises its funding and administrative powers regardless of whether the remedy extends directly to the local recipient of the federal funds. It is commonplace in federally funded programs that requirements arising out of federal law, frequently anti-discrimination law, apply directly and independently to the federal funding agency. See, e.g., *NAACP, Western Region* v. *Brennan,* 360 F.Supp.1006, 1019 (D.D.C. 1973). ("If . . . [the Federal] Defendants have an obligation to fulfill under the Fifth Amendment and other statutes and regulations . . . [h]olding Defendants to that obligation does not prejudice the States or require their presence before the Court . . .")

The only other Government argument that relates, even indirectly, to HUD's use of the housing market area is the Government's assertion that metropolitan relief would breach the principle of tailoring a remedy to the nature and extent of the violation. (Br. 13.) In this connection the Government points out that the complaint in this case charged HUD with discrimination only in Chicago, not in suburban areas (Br. 13), asserts that from its inception this litigation has focused exclusively upon discrimination within Chicago (Br. 20), and quotes statements of the district judge to similar effect. (Br. 10, 22.)

We show in Part II, in relation to our separate argument that this case includes evidence of *de jure* suburban discrimination by HUD, that under Federal Rule 15(b) and decided cases the complaint here is to be treated as if it has been amended to raise the issue of suburban

discrimination by HUD, and that contrary to the statements of the Government and the district judge the issue of metropolitan relief against HUD has been a central and thoroughly litigated issue from the moment proceedings against HUD resumed in 1969 following entry of the remedial order against CHA.

However, quite aside from the evidence discussed in Part II, the "tailoring" principle would not be breached by housing market area relief against HUD in this case. Although HUD's Chicago discrimination of course occurred within Chicago, it also occurred within the Chicago Housing Market Area. In programmatic terms (as well as in "real world" terms of commuting patterns, economic and social inter-relationships, and market competition among dwelling units) we have it from HUD itself that the market area is the relevant area with respect to the problem of dealing with discrimination of the sort that occurred here—denial of minority housing opportunities outside areas of minority concentration. A market area remedy in this case *would* therefore be a remedy tailored to the violation that occurred in this case. (The principle, after all, speaks of the "nature and extent," not the "place," of the violation.)

Moreover, it is the office of equity to remedy the effects of violations whatever the precise nature of the conduct that caused the effects. (A large scale violation might have narrow effects; a limited violation might produce broad consequences.) This is nowhere better illustrated than by this Court's decision in *Louisiana* v. *United States, supra.* There the "nature" of the violation was the discriminatory use of a particular voting test while the effects of the violation were to disenfranchise a large class of persons. A second and different voting test was "never challenged in the complaint or any other

pleading," and there was no finding of discrimination respecting it. (380 U.S. at 154.) Yet to remedy the effects of a violation relating solely to the use of the first test, this Court upheld an injunction against the use of the second. (*Id.* 154-55.) It did so not because it ignored the principle that the remedy must be tailored to the violation but because it properly treated that principle as referring to the consequences caused by the violation and the action necessary to remedy them effectively. So it is here. If the effects of HUD's violation are such—as the court of appeals has found and HUD virtually acknowledges—that they can be effectively remedied only if HUD is directed to utilize its powers in the housing market area to that end, then *Louisiana* shows that equity may require HUD to do so. The least plaintiffs should be entitled to from HUD is that HUD should employ its funding and administrative powers to try to provide them with an effective remedy for the wrongs that have been done them within the area HUD itself says is the relevant area to be used in "decreasing the effects of past housing discrimination." 37 Fed. Reg. 203.

HUD is thus (1) an independently liable party, (2) exercising powers independent of local housing agencies, and (3) possessing jurisdiction and exercising funding and administrative powers over a metropolitan housing market area it has itself determined to be the proper geographic area respecting the very deconcentration issue presented by this case. Relief as to HUD's powers extending to that area is therefore neither "inter-district" under *Milliken* nor broader than the area the defendant has itself determined to be the appropriate area for dealing with the remedial issue presented by this case.*

* In a school desegregation case where school buildings are already located in both white and black neigborhoods,

II. Housing Market Area Relief Against HUD is also Proper under Milliken because There is Evidence Here Both of Discrimination by HUD in Suburban Areas and of the Impact of HUD's Discrimination Across City-Suburban Lines.

This case also differs from *Milliken* in another and separate respect that should be controlling. In *Milliken* there was "no evidence hinting" of anything but unitary systems in the suburban areas (418 U.S. at 748-49), and "no evidence of any inter-district violation or effect . . ." (418 U.S. at 745.) In this case "there is evidence of suburban discrimination" (503 F.2d at 937), as well as evidence that the effects of HUD's discrimination, both within and without the central city, spread beyond the local political jurisdiction within which it occured.*

* (Continued)

desegregation is possible by such means as adjustment of boundary lines, pairing of schools, transportation arrangements, and the like. In a housing desegregation case where the discrimination has consisted of placing housing exclusively, or nearly so, in black neighborhoods, no analogous desegregation tools are available. The only way to remedy the discriminatory effects of the past is to require that future subsidized housing be so located as to afford the choice of white as well as black neighborhoods that had previously been denied. Appendix A to this brief lists several possible forms of metropolitan relief, some limited to HUD and some extending to local housing agencies. The extension of metropolitan relief to local housing agencies is discussed in Part III below.

* The Government says it is arguable whether *Milliken* requires both an inter-school district violation and an inter-school district effect, or only one or the other, before inter-school district relief may be granted. (Br. 19.) As discussed in Part I above, this is not an "inter-district" case at all as regards relief against HUD, and the question posed by the Government need not be faced for that reason. But even if the case were to be so re-

Over the last twenty years a total of thirteen federally subsidized housing projects have been developed by HUD and local housing authorities under the United States Housing Act of 1937 within the suburban portion of the Chicago Urbanized Area.* Of the dozen projects for

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* (Continued)

garded—improperly, we think—the discussion in this Part II shows that both factors are present here.

* An "urbanized area" consists of a central city and "surrounding closely settled territory" as defined by the Census Bureau (Bureau of the Census, *1970 Census of Population, General Population Characteristics, Illinois,* PC (1)-B15 Ill. (October 1971), Appendix A, pp. 3-4), and therefore encompasses the most densely populated portion of the housing market area surrounding a central city, essentially excluding rural and non-contiguous portions. The Government says that because respondents suggested a form of metropolitan relief covering the Chicago Urbanized Area there is confusion over the geographic scope of metropolitan relief. (Br. 35, n.29.) For the reasons given in Part I above the housing market area is the appropriate geographic area to be considered in formulating a remedial decree. That does not mean or require that the district court *must* include the entirety of the housing market area in the final form of remedial decree. For example, subject to the necessity that the remedial area be large enough to afford effective relief (which, as the uncontradicted evidence shows, in this case requires the inclusion of areas outside of Chicago), HUD's established criteria might well lead the district court to exclude rural areas that may lack adequate services and facilities.

In this connection the strident amicus curiae brief of the City of Joliet reads as if HUD's project selection criteria and housing assistance program regulations would not govern HUD's exercise of its powers and screen out inappropriate locations for subsidized housing. And quite apart from HUD's own evaluation processes, the Joliet Housing Authority—which is of course to be sharply distinquished from the City of Joliet—would have full procedural and substantive rights to participate in the shaping of a remedial decree. See the discussion in Part III.

which the record contains location data ten are in (or, in one case in which census tract boundaries were changed, adjacent to) overwhelmingly black census tracts, while the other two are so close to such tracts that one is within and the other just outside the black residential type of area defined as the "limited" housing area by the district court. The result is that occupancy of all but one of the dozen projects is virtually all black. (Plaintiffs' Exhibit 11.)*

The full extent of this suburban discriminatory pattern is revealed only by comparing the project locations shown on Exhibit 11 with racial residential patterns in the entire Chicago Urbanized Area. Appendix B to this brief, a map of the urbanized area, depicts its "limited" housing areas and the locations within the urbanized area of the federally subsidized housing projects shown on plaintiffs' Exhibit 11. It is obvious that the overwhelmingly white suburban portion of the Chicago Urbanized Area** con-

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* The limited housing area is defined as that part of Cook County within census tracts having 30% of more nonwhite population or within one mile of such tracts. (304 F. Supp. at 737.) The record contains no location data as to the thirteenth project, a leased housing program of 95 apartments in Evanston, or respecting projects in the metropolitan area outside the urbanized area. However, the greater part of Evanston is within the limited housing area. Bureau of the Census, *1970 Census of Population and Housing, Census Tracts, Chicago, Ill. Standard Metropolitan Statistical Area, Part 1,* PHC(1)-43, P-68, P-69 and Inset A.

** According to the 1970 census the population of the Chicago Urbanized Area (exclusive of Chicago and Indiana) is almost 96% white and less than 4% black. Of a total population of 2,818,199, the white population was 2,700,562, the black population 101,935, and the population of other races 15,702. Bureau of the Census, *1970 Census of Population, General Population Characteristics, Illinois,* PC(1)-B15 Ill. (October 1971), p. 105.

tains several small black residential areas, and that with near-perfect accuracy over a period of more than two decades (the only possible exception being 95 leased apartments in Evanston whose locations are not disclosed in the record) all federally subsidized housing projects within the urbanized area have been placed in or at the edge of the black residential areas. Paraphrasing what the trial judge said in the first instance respecting CHA's liability (296 F. Supp. at 913), in the face of these figures HUD's failure to present a substantial or even speculative indication that impermissible racial criteria were not used in locating these projects supports the determination of the court of appeals that HUD's discriminatory conduct extended to the suburban portion of the housing market area. *Jones* v. *Georgia,* 389 U.S. 24 (1967) (finding of *de jure* discrimination based entirely on jury selection statistics and absence of explanation); *Hernandez* v. *Texas,* 347 U.S. 475 (1954) (same). Even apart from such cases as *Jones* and *Hernandez,* under *Keyes* v. *School District No. 1, supra,* 413 U.S. at 208-09, the adjudication of HUD's *de jure* discrimination in the Chicago portion of the housing market area creates a presumption, here unrebutted, that the segregated suburban pattern is not adventitious.

While contending that the facts do not support a finding of discrimination by HUD in the suburban areas, HUD argues that even if they could be viewed as "probative" (Br. 24) the allegations of the complaint and statements of the district judge show that from its inception this litigation has focused exclusively upon discrimination within Chicago, a focus the court of appeals is said to have improperly shifted to the metropolitan area. (Br. 20, 25.)

In fact plaintiffs' Exhibit 11 was offered to show that the racial segregation pattern of subsidized housing in

the city was duplicated in the suburban area (Transcript of Proceedings, November 27-28, 1972, pp. 76, 210), and Exhibit 11 together with other evidence to be discussed below *(Id.,* pp. 130-131, 134, 141-49) was offered to show "that HUD has helped to create this pattern of the black city and the white suburb" *(Id.,* p. 77), and "had helped to produce the segregated situation not only within the cities and within the suburbs, but city against suburb that constitute a part of the problem of relief in the case." *(Id.,* p. 139.) Though HUD objected to the offer of Exhibit 11, following the admission of the exhibit HUD did not adduce evidence to the contrary but chose to limit its case to the paucity of housing subsidy funds then said to be available. *(Id.,* Nov. 29, 1972, pp. 330-48.) Thus, under Federal Rule 15(b), the complaint is to be treated as if it had been amended to raise the issue of discrimination by HUD in the suburbs. *Purofied Down Products Corp.* v. *Travelers Fire Insurance Company,* 278 F. 2d 439, 444 (CA 2, 1960); *Decker* v. *Korth,* 219 F. 2d 732, 739 (CA 10, 1955).

Moreover, the question of metropolitan relief against HUD has been in the case against HUD from the time that case became active, and HUD itself has offered evidence and the district court has called for remedial proposals on that subject. Apart from the prayer of the complaint for "other and further" relief, plaintiffs' original motion for summary judgment against HUD sought housing market area relief. (Pet. App. 15a.) HUD responded with a lengthy affiidavit and documentary evidence describing its activities in the housing market area outside Chicago. (Affidavit of Don Morrow, Record Item 52, Appeal No. 71-1073.)* Upon remand (following re-

* HUD did not contend that the question of such relief was outside the issues in the case; to the contrary, it argued

versal of its dismissal of the complaint against HUD) the district court itself requested the submission of remedial proposals "not confined in their scope to the geographic boundary of the City of Chicago." (App. 50.) Thereafter HUD joined respondents in representing to the district judge that metropolitan relief was desirable, that HUD would be willing to participate in the development of a metropolitan remedy responsive to the Court's request if state and local governments "took the lead," and that HUD "endorse[d] the concept" of metropolitan approaches to the housing problem. (Transcript of Proceedings, February 22, 1972, pp. 4-7, App. 62-64.) Although its own remedial proposal did not include metropolitan relief (other than cooperation respecting the optional Cook County part of the 1969 order against CHA), the document HUD called its "best thinking" did include significant metropolitan-wide housing activities to be undertaken both by CHA and itself. (Plaintiffs' Exhibit 18, e.g., pp. 5, 7, 8, 10, to Hearing of November 27-29, 1972, App. 152-54.)

Thus, as the court of appeals recognized, it is not correct to say that the litigation has focused exclusively upon discrimination within Chicago, or that the question of metropolitan relief goes beyond the issues in the case; the contrary statements of the Government and the district judge overlook the portions of the record just referred to which show not only that "the possibility of metropolitan relief has been under consideration for a long

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• (Continued)

that such relief was unnecessary because of the voluntary remedial steps it was already taking in the metropolitan area. (HUD Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, p. 22, Record Item 52, Appeal No. 71-1073.)

time in this case," 503 F. 2d at 937, but that HUD has actively participated in that consideration, offered evidence respecting it and joined in a specific representation to the district judge concerning its desirability.

In addition it is established that courts apply the law in effect at the time of the rendering of judgment, not the filing of the complaint, *Thorpe* v. *Housing Authority of Durham, supra,* 393 U.S. at 281-83, and that equity will similarly deal with the conditions that exist at the time of the entry of a decree. *Green* v. *School Board of New Kent County,* 391 U.S. 430 (1968). HUD's basic obligations when the complaint was filed in 1966 under the Fifth Amendment and the essentially prohibitory 1964 Civil Rights Act were reinforced and elaborated by the passage of the 1968 Civil Rights Act to include *affirmative* administration of all of HUD's housing programs to achieve fair housing objectives. *Shannon* v. *Department of Housing and Urban Development, supra,* 436 F. 2d at 820.• Subsequently, as evidenced by the Project Selection Criteria and the housing assistance program regulations, HUD recognized that its 1968 Act obligations included dealing with the problem of minority concentration on a housing market area basis. That is the situation that obtained when the issue of the proper scope of relief against HUD was finally presented to the district court on remand. No authority requires that plaintiffs be denied the benefits of a remedial approach based upon HUD's

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• "This affirmative action provision [of the 1968 Civil Rights Act] reinforced the provisions of Title VI of the 1964 Civil Rights Act prohibiting discriminatory actions by the Federal Government." *(Housing in the Seventies,* Report of the Department of Housing and Urban Development, Hearings before the Subcommittee on Housing of the Committee on Banking and Currency, 93rd Cong. 1st Sess., Part 3, p. 2017.)

extant affirmative duties because their complaint, filed earlier, had not anticipated the later passage of a new law and HUD's promulgation of regulations under it.

In addition to the evidence of HUD's suburban discrimination the record shows that segregated housing patterns within the central city and the surrounding suburban community are intimately related, historically (Transcript of Proceedings, November 28, 1972, pp. 156-60), as well as currently *(Id.,* November 27, 1972, pp. 92-93), and that the impact or effect of housing segregation in either place spreads throughout the market area. The Government describes the court of appeals' conclusion respecting the extra-city impact of segregation within the city as "conjecture." (Br. 26.)• Yet the record contains HUD's express admission of that fact:

> "[T]he impact of the concentration of the poor and minorities in the central city extends beyond the city boundaries to include the surrounding community." (Statement of George Romney, Appendix A, pp. 15-16, to HUD's Memorandum, Record Doc. 283.)

That impact is of course quite understandable given the fact that within the housing market area dwelling units are in competition with one another, or, as HUD has elsewhere put it, that "the city and its surrounding area

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• HUD now conjectures that segregation in the central city might not induce "white flight" but rather have the effect of stemming it. (Br. 27-28.) This is inconsistent with its own stated position, not advanced for litigation purposes: "When such concentrations [of large numbers of federally subsidized housing units] have occurred in central cities, they have contributed to the physical and social deterioration of the city, and have hastened the exodus from the cities of the more stable elements of society." (Testimony of George Romney, quoted in *Implementation of HUD Project Selection Criteria for Subsidized Housing: An Evaluation, supra,* p. 7.)

comprise a single 'locality' for low-rent housing purposes." (Plaintiffs' Exhibit 13, pp. 304.)

Moreover, since federally subsidized housing was located almost exclusively in black areas in the Chicago Housing Market Area, both within the central city and without it, all who wished to live in federally subsidized housing in the Chicago metropolitan area had no choice other than to live in such black neighborhoods. The confinement of federally subsidized housing projects in the suburbs to black residential areas thus shut off opportunities that would otherwise have existed within the market area for persons in the central city to exercise housing choice. Under even the most stringent reading of *Milliken* the evidence in this case thus shows "inter-district" effects from HUD's discrimination—suburban effects from the discrimination in the city and city effects from the discrimination outside it.•

• *City of Black Jack* v. *United States,* No. 74-1293, cert denied —— U.S. ——, 43 U.S.L.W. 3671 (1975), involved a suburban housing project in Black Jack, Missouri intended to provide housing opportunities for families residing in the ghetto areas of the City of St. Louis. (Brief for the United States in Opposition, p. 2.) The Government instituted the action alleging, among other things, that the effect of a Black Jack zoning ordinance had been to deny housing within Black Jack to low-and middle-income black residents "of the St. Louis metropolitan area," *(Id.* p. 3), and *stipulated* that "segregated housing *in the St. Louis metropolitan area* was 'in large measure the result of deliberate racial discrimination *in the housing market* by the real estate industry and by agencies of the *federal,* state, and local governments . . .'." ((*Id.* p. 5, emphasis supplied.)

The author of the following passage was HUD's General Counsel at the time of writing.

> "A large portion of the center city populace are members of minority groups while the suburbs remain predominantly white. Every additional low-

There is a suggestion in Mr. Justice Stewart's opinion in *Milliken* that residential patterns may be caused by "unknown and perhaps unknowable factors . . ." (418 U.S. at 756.) HUD, however, acknowledges that at least one known factor is the significant contribution of the Federal Government to the creation of segregated housing patterns. In Congressional hearings in 1970 the following colloquy took place between then HUD Secretary George Romney and Senator Walter Mondale:

> "Secretary Romney: . . . I would now like to turn to . . . 'the question of whether or not the Federal Government—through past or present policies—has contributed to the creation of segregated housing patterns.' The answer, of course, is 'Yes.' . . .
>
> Senator Mondale: It is correct that although most housing was developed without Federal assistance, the Federal leadership role, to which you make reference, during this period was one which legitimized racial covenants and lily white suburbs?
>
> Secretary Romney: There isn't any question about that . . .
>
> Senator Mondale: . . . [W]e had an official policy encouraging Americans to live separately.
>
> Secretary Romney: That is right.
>
> Senator Mondale: So I agree with you that while the sole villain was not the Federal Government, sometimes we forget or choose to ignore the degree to which the Federal Government was implicated not too long ago.

• (Continued)

> income project HUD approves for financial assistance in central cities inevitably reinforces segregated housing patterns. Conversely, projects outside central cities potentially break down segregation. Projects in both sections are needed to provide decent housing for the poor." *(HUD's Project Selection Criteria—A Cure for "Impermissible Color Blindness"?* David O. Maxwell, 48 Notre Dame Lawyer 92 (1972).)

> Secretary Romney: That is right . . . [T]he dominant majority supported or condoned social and institutional separation of the races. This attitude became fixed in public law and public policy . . . and thus it was adopted as a matter of course by the Federal Government when it entered the housing field in the 1930's. It continued after World War II. . . . FHA's policies [FHA is a constituent division of HUD] have changed, of course. . . . But changes in FHA policies have thus far had little practical effect on the pattern of residential segregation which has come to characterize our great metropolitan areas. . . ." (Hearings before the Senate Select Committee on Equal Education Opportunity, 91st Cong. 2d Sess., 1970, pp. 2754-56.)

The United States Commission on Civil Rights has expressed the view that HUD's contribution to today's segregated housing patterns has been determinative.

> "The segregated housing patterns that exist today are due in large part to racially discriminatory FHA policies in effect during the post World War II housing boom. FHA and VA together have financed more than $117 billion-worth of new housing since World War II. Less than two percent of it has been available to non-white families, and much of that on a strictly segregated basis." Report of the United States Commission on Civil Rights, *A Time to Listen . . . A Time to Act*, G.P.O., Washington, D.C. (1967), p. 126.•

• The Report of a Presidential Commission states, "It may fairly be charged that in line with the prevailing general attitude, Federal funds were so used for several decades [following World War II] that their effects were to intensify racial and economic stratification of America's urban areas." (*Building the American City*, Report of the National Commission on Urban Problems, G.P.O., Washington, D.C., House Document No. 91-34, p.12.)

Although, as Secretary Romney pointed out, even in

But whatever the degree of Federal Government culpability for the racially segregated residential patterns within communities and as between cities and suburbs *generally,* the degree of that culpability with respect to the *federally subsidized portion of the housing market* that is at issue in this case cannot be doubted. As to federally subsidized housing there is no question, particularly when its actions are viewed in "historical context," *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 799, 810 (CA 5, 1974), that HUD has discriminated throughout the Chicago Housing Market Area, that its discrimination is significantly responsible for the segregated conditions that today exist in federally subsidized housing throughout the market area, and that the discrimination in any part of the area affects those who are

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the peak years of federal housing activities two out of three homes built in the United States were financed without federal involvement (Senate Select Committee Hearings, *supra,* p.2754), the private lending institutions that financed the "non-federal" homes were supervised by federal agencies that had themselves adopted discriminatory policies. See Hearing Before the United States Commission on Civil Rights, June 14-17, 1971, Federal Policy and Equal Housing Opportunity, by Martin E. Sloane, G.P.O., Washington, D.C., pp. 735, 738-39. FHA discriminatory policies were also said to have a strong influence on the housing industry. "FHA was looked to for leadership by members of the private housing and home finance industry, and many of its policies were adopted by that industry . . . Its policy on housing discrimination and segregation also was a strong influence on industry. One observer characterized this policy as 'separate for whites and nothing for blacks.'" (*Id.* at 734-35.) Like testimony was offered in this case. (Transcript of Proceedings, November 28, 1972, pp. 121-87, esp. 146.)

eligible for such housing who live anywhere within the area.•

Thus, even if housing market area relief against HUD were to be viewed—improperly, we think—as "inter-district" in the sense in which that term is used in *Milliken,* the evidence in this case of suburban discrimination by HUD, and of the impact of HUD's city and suburban discrimination across city-suburban lines, would justify housing market area relief against HUD.

III. Because Milliken Dealt with Questions of Equitable Remedies, not Substantive Constitutional Law, and Equitable Factors Decisive Against Metropolitan Relief in That Case are Absent Here, Milliken Does Not Foreclose Housing Market Area Relief Against HUD Apart from the Reasons given in I and II. In Addition, Housing Market Area Relief Against HUD in This Case is Practical, Judicially Manageable, Consistent with Congressional Policy and Necessitated by Traditional Equitable Considerations.

Accepting for purposes of argument the Government's view that *Milliken* stands as an impassable obstacle to inter-school district remedies in every case that does not involve inter-school district segregative acts or effects, we have shown in Parts I and II that for two separate reasons housing market area relief against HUD is not inconsistent with such an interpretation of *Milliken.* However, we do not believe that the Government's view of *Milliken* is correct. We think *Milliken* is properly to be understood as growing out of equitable factors,

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• As one observer put it,
"The wall of white hostility forced Negroes into ghettos. Negro public housing followed them into the ghettos. There it has essentially remained." Lawrence M. Friedman, *Government and Slum Housing,* (Rand McNally 1968), p.123.

particularly relating to judicial manageability, present in that case. Upon such a reading of the *Milliken* opinion we show in this Part III that, the circumstances here being markedly different, housing market area relief against HUD is appropriate and not foreclosed by *Milliken* apart from the reasons already given in Parts I and II.

Milliken dealt with questions of equitable remedies, not substantive constitutional law. As Mr. Justice Stewart stated:

> "[T]he Court does not deal with questions of substantive constitutional law. The basic issue now before the Court concerns, rather, the appropriate exercise of federal equity jurisdiction." 418 U.S. at 753.

The general statements quoted by the Government as constituting the "holding" of *Milliken* are therefore to be understood in relation to the facts, particularly the equitable considerations, presented by that case.*

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* "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia,* 19 U.S. 264, 399-400 (1821). (Opinion of Mr. Chief Justice Marshall.)

"In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing

Milliken addressed a proposal to set aside the boundaries of substantially autonomous local school districts. A significant sentence in the opinion written by Mr. Chief Justice Burger begins, "Before the boundaries of separate and autonomous school districts may be set aside . . ." (418 U.S. at 744.) Four equitable considerations of practicality and judicial manageability growing out of that circumstance loomed large in the Court's opinion: (1) the "deeply rooted" tradition of local control over schools; (2) the "logistical and other serious problems attending large-scale transportation of students"; (3) the "array of other problems in financing and operating this new [consolidated] school system"; and (4) the likelihood that the contemplated inter-school district remedy would require a "complete restructuring of the laws of Michigan relating to school districts" and could "disrupt and alter the structure of public education in Michigan." (418 U.S. at 741-43.) The fear was expressed that these considerations would inevitably lead to the district court becoming "first, a *de facto* 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area." (418 U.S. at 743-44.) It is hardly likely that these factors would have been so emphasized if the Court had intended to announce a rule which, regardless of their presence or absence, would foreclose inter-school district remedies in every situation in which inter-school district acts or effects were lacking.

In this case the circumstances are entirely different and any similar concern about the remedial role of the

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interests, notwithstanding those interests have constitutional roots." *Lemon* v. *Kurtzman,* 411 U.S. 192, 201 (1973). (Opinion of Mr. Chief Justice Burger.)

district court under a housing market area order against HUD is wholly unjustified. The point may be illustrated by reference to the existing remedial orders relating to Chicago. Those orders essentially direct HUD to permit federal funds to be used for new subsidized housing in the City only if (a) the housing meets locational criteria, that is, is predominantly located in white neighborhoods, and (b) a specified proportion of it is made available to the plaintiff class. (304 F.Supp. 736; 363 F.Supp. 690.) Though little remedial housing has yet been provided, HUD has attributed the delay to "normal bureaucratic procedures," not to any impracticality of the orders. (384 F.Supp. at 38.)*

Moreover, remedial efforts thus far do not include HUD's exercise of its direct powers under the 1974 Act. HUD has only just begun to take steps to provide remedial housing under that Act, the order covering the new provisions not having been entered until May, 1975. (App. 221.) Significantly, HUD did not object on practicality or other grounds to the entry of that order, which contains location and availability criteria similar to those in the previous remedial orders covering the older programs.

Yet one option available to the district judge on remand is to frame a housing market area remedial order directed to HUD on the same principle as the extant city orders. Just as the two criteria of location outside areas of black concentration and availability to the plaintiff class have been "added" to HUD's other criteria as conditions for the use of federal housing funds in Chi-

* However, it is clear that the reasons for the delay also include the lack of sufficient suitable land remaining in the general public housing or predominantly white areas of the City. See the discussion in the text, *infra*.

cago, so they could be added as conditions for the use of federal housing subsidy funds in the suburban portion of the housing market area. (See Appendix A to this brief.) So framed, such an order would present no greater or different problems of practicality or judicial manageability than the city orders. Federal housing programs operate identically in the suburbs as in the city; in both places HUD receives proposals from housing developers, public and private, which it then evaluates on the basis of its various criteria. Nor would such an order set aside the boundaries of autonomous local agencies—indeed, no boundaries at all would be set aside. Obviously, too, no traditions of local control would be interfered with, no transportation of persons would be ordered or required and no consolidation of local governmental units or restructuring of local laws would be entailed. In short, factors such as those which led to the concern in *Milliken* that the district court would become the "school superintendent" for the entire area would be wholly absent.

Two additional major differences between housing market area relief against HUD in this case and the consolidation of local school districts proposed in *Milliken* merit emphasis. The first has to do with the element of coercion or compulsion. In *Milliken* it was clear that not only the Detroit School Board and the State of Michigan but large numbers of innocent suburban school districts as well were to be subject to the proposed order. A major impact of any remedial order would thus fall on innocent governmental bodies.* Further, the order against the

* *Milliken* dealt not simply with a remedy that was "areawide" in geographical terms but with a "*multi-district*, areawide remedy" (418 U.S. at 721, emphasis supplied), which mandated the involvement in the remedial plan of the "included school districts" (*Ibid*).

innocent districts would have been coercive in that the districts would have been required to abandon existing administrative and financial arrangements and enter into new ones. Finally, the impact of such an order would have fallen coercively upon individuals: suburban school children would have been *assigned* to particular schools as a result of the court decree.

Here, by contrast, notwithstanding the Government's inaccurate assertion that "coerced consolidation" or participation of innocent local governments would necessarily be involved in any form of metropolitan relief (Br. 36), a housing market wide remedial order confined to HUD would run only against a "guilty" party. No innocent governmental entities or private persons would be subject to it. Innocent suburban housing authorities would not be ordered, or asked, to do anything. Innocent residents of suburban localities would not be ordered to move to the central city or elsewhere; they too would not be ordered, or asked, to do anything. (Nor would plaintiffs and the members of the class they represent be coerced in any way. Rather, they would be given the opportunity to choose to live in suburban housing if they so desired, an opportunity they would be free to accept or reject.) Thus, the element of coercion and impact upon innocent governmental bodies and persons necessarily involved in the proposed metropolitan order in *Milliken* would be wholly lacking in a housing market area order against HUD.

The second additional major difference between housing market area relief against HUD in this case and the proposed remedial order in *Milliken* has to do with "racial balance." It seemed clear to this Court in *Milliken* that the lower courts there had held the view "that total desegregation of Detroit would not produce the racial balance which they perceived as desirable" (418 U.S. at

740), and that the metropolitan area had been selected as the geographic remedial area only for that reason. (Id. at 739-40.) Mr. Chief Justice Burger's opinion said that the lower courts had assumed that Detroit schools could not be truly desegregated unless the racial composition of the student body "of each school" substantially reflected the racial composition of the population of the metropolitan area as a whole, and the opinion quoted the district court's view that desegregation required that "no school, grade or classroom" be substantially disproportionate to overall pupil racial composition. (*Ibid.*)

In this case no such view has been expressed or employed concerning racial balance or—the analogy here to the racial composition of student bodies—the racial composition of housing projects. The remedy called for here, the provision of remedial housing, is most nearly analogous to the building of new schools. This Court has held that it is an appropriate element of a school desegregation decree to see to it that future school buildings are so located that they do not perpetuate segregation. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21 (1971). Here, where the focus of a plan to provide remedial housing is likely to be upon just such future location criteria, the Court is not presented with a situation at all comparable to one involving a decree that seeks to provide a particular racial mix in all schools, grades or classrooms.

In addition, nothing like busing or the pairing of schools—techniques that mandate an involuntary rearrangement of existing pupil travel patterns—is involved. As already noted, remedial housing will be occupied by those, and only those, who voluntarily apply for it. The racial mix that will result from such exercises of in-

dividual choice is not known in advance. Neither is it prescribed in any way. Most importantly, the housing market area has been selected as the proper remedial area not because using it will produce a racial balance deemed desirable by anyone but because, being the "market" area, using it will provide as effectively as possible the housing *choice* (i.e., to live in either white or black neighborhoods rather than to be officially confined to the latter alone) the denial of which constituted the constitutional and statutory violation which must be remedied in this case.*

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* Thus the Government's assertion (Br. 25) that the court of appeals in this case shifted the focus to metropolitan relief to produce a racial balance it perceived as desirable is wholly unjustified (even apart from the fact, noted in Part II above, that with respect to HUD the focus had been on metropolitan relief from the filing of plaintiffs' motion for summary judgment in 1969 and that there was therefore no "shift").

In this connection the Government says that the Constitution requires "racially neutral operation of each politically separate system." (Br. 25). This formulation is perhaps unobjectionable once the effects of a constitutional or statutory violation have been effectively remedied (see *Swann* v. *Board of Education,* 402 U.S. 1, 31-32 (1971)), and, further, if it is understood to apply to the federal government, in this case HUD, as well as to state and local governments, and not to be inclusive of statutory obligations such as the "affirmative administration" mandate delivered to HUD by the 1968 Civil Rights Act, 42 U.S.C. §3608(d)(5). However, as stated by the Government, the formulation omits entirely any reference to the remedial duty "so far as possible [to] eliminate the discriminatory effects of the past," *Louisiana* v. *United States, supra,* 380 U.S. at 154, a duty quite distinct from the separate obligation the Government's statement does recognize to "bar like discrimination in the future." *Ibid.* It is of course the former duty to which this case is now addressed.

Nonetheless, in Section C of its brief (pp. 28-40) the Government advances four "practical considerations" said to militate against metropolitan relief in this case. They relate to local control over land use, the statutory scheme for federally subsidized housing, costs and burdens that allegedly flow from such housing, and the allocation of remedial housing among different groups of eligible persons. In the balance of this Part III we show that these arguments are without substance and that housing market area relief against HUD is practical, judicially manageable, consistent with Congressional policy and necessitated by traditional equitable principles.

Local Control Over Land Use. The first of the supposed practical difficulties which a housing market area order would encounter is an asserted conflict with the tradition of local control over land usage (of which, however, the Government acknowledges subsidized housing forms but a "small part"). (Br. 29.) However, local control over land usage is not involved here in any way. Subsidized housing must conform as much as private housing to local land use controls, such as zoning. No remedial order in this case, and none that has been suggested, whether intra-city or metropolitan, would impinge upon local control over land use; it is misleading to imply the contrary.

> "Sites for HUD-assisted housing must be selected and acquired by local sponsors—public or private—and housing developed on those sites must conform to local building codes." (Statement of President Nixon, quoted in Appendix A, p. 13, to HUD's Memorandum, Record Doc. 283.)*

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* Of course, if the zoning power or other land use controls are employed in a racially discriminatory manner, courts will give relief. See, e.g., *Kennedy Park Homes*

The Statutory Scheme. Second, the Government argues that the federal statutory scheme reserves to the local community the decision whether to participate in federally subsidized housing programs, and implies that a metropolitan remedial order would conflict with that scheme. (Br. 29-34.) The argument is factually incorrect as regards the housing asistance programs created by the 1974 Act, and it affords no reason for denying metropolitan relief even as to the older, pre-1974 housing programs.

The factual error arises from the Government's repeated but erroneous assertion that it is "communities" or "municipalities"—i.e., units of general local government—that participate in and provide subsidized housing under federal housing programs. Thus, the Government asserts that nothing in the federal statutes requires any "community" to participate in federal housing programs (Br. 29), and says that the decision whether or not to participate is explicitly or as a practical matter "reserved to the local government." (Br. 31.) The very caption of this portion of the Government's brief proclaims that the statutory scheme reserves that decision to the "local community." (Br. 29.) At only one point, terming it "one minor exception" (Br. 30), does the Government acknowledge that this is not the statutory scheme at all under the Housing and Community Development Act of

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Ass'n. v. *City of Lackawanna*, 436 F.2d 108 (CA 2, 1970), cert. denied 401 U.S. 1010 (1971); *United Farmworkers* v. *City of Delray Beach*, 493 F.2d 799 (CA 5, 1974); *United States* v. *City of Black Jack*, 508 F.2d 1179 (CA 8, 1974), cert. denied —— U.S. ——, 43 U.S.L.W. 3671 (1975); *Gautreaux* v. *Chicago Housing Authority*, 480 F.2d 210, cert. denied, 414 U.S. 1144.

1974. And even this acknowledgment that "local governmental approval is no longer explicitly required as a condition of the program's applicability to a locality" (Br. 33-34) is coupled with the assertion that local governmental bodies must nonetheless be "substantially involved." (Br. 34.)

The 1974 Act in fact eliminates local governmental approval as a requirement for federally subsidized housing provided under the programs established by the Act. It gives to HUD, not to units of general local government such as city councils or village boards, the power to contract with private developers for new and substantially rehabilitated housing. 42 U.S.C. §1437f(b)(2). It similarly gives to HUD, not to such units of local government, the power to administer the existing housing program (in buildings neither newly constructed nor substantially rehabilitated) wherever local housing agencies are not organized or are unable or unwilling to do so. 42 U.S.C. §1437f(b)(1). In neither case is the decision to participate "reserved" to local governments.

Neither is the local government "substantially involved." The Government's brief says that in the former case—HUD contracting directly with a private developer—the local government is substantially involved because the private developer requires zoning approval and municipal services. (Br. 34; Reply Mem. 2, n.l.) We have already noted that federally subsidized housing must always conform to zoning and other land use controls in the same manner as non-subsidized housing. The possibility that a local government *might* deny a private developer zoning changes (a non-existent possibility if the land is already properly zoned) or municipal services (a non-existent possibility if the land already has them) is ob-

viously not a reason to deny plaintiffs relief as to *HUD's powers,* exercisable by HUD independently of local governments, to enter into contracts with private housing developers. This is likewise true with respect to HUD's power to administer an existing housing program in the absence or unwillingness of a local housing agency to do so, an authority possessed by HUD despite the Government's failure to refer to it in this connection. (In this context zoning is already proper and municipal services are already provided because the housing is already in place.)

The Government's mistaken view is also reflected in its erroneous description of the "block grant program" of the 1974 Act as one of three public housing programs to which this litigation is said principally to relate. (Br. 31, 32-33.) In fact, the so-called block grant program is not a housing program at all but a community development program which supersedes urban renewal, model cities and other former "categorical" development programs and is contained in an entirely separate title from the housing program created by the 1974 Act that *is* involved here. Thus, the block grant program, established by Title I (Community Development) of the 1974 Act, provides funds for a long list of activities, not including subsidized housing. Public Law No. 93-383, Title I, 88 Stat. 633-54, §§101-18, esp. §105. The subsidized housing program, established by Title II (Assisted Housing) of the 1974 Act, provides funds specifically and only for subsidized Housing. *Id.,* Title II, 88 Stat. 654-77, §§201-13, esp. §8 of §201(a). Local municipalities *do* apply for and are the recipients of Title I community development funds; the decision whether or not to participate in Title I activities is thus explicity reserved to the local government. *Id.,* 88 Stat. 634-40, §§103(a), 104(a).* Local municipalities do *not* apply for and are not recipients of Title II subsidized housing funds; the decision whether or not to participate in Title II activities is thus *not* reserved to them but is given over by statute to housing developers, private and public, and private landlords. *Id.,* 88 Stat. 662-67, §8 of §201(a).

Thus the Government's discussion of the "one minor exception" is simply incorrect. Under the 1974 Act subsidized housing programs operate independently of units of general local government such as city councils, village boards, and the like; local housing agencies may participate if they wish, but neither they nor local municipal governments can prevent HUD from deciding that the 1974 Act housing programs shall be permitted to operate within their jurisdictions.

Nor is this "minor" exception very minor. Indeed, HUD Secretary Hills has indicated that in the future HUD intends to rely principally upon the 1974 amendments in

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* As the Government points out, a Title I application includes a housing assistance plan, but the thrust of this requirement is the reverse of the implication in the Government's argument that the federal statutory scheme gives local governments the power to frustrate proposals for federally subsidized housing. The housing assistance plan puts local governments on record as acknowledging the need for low income housing, and the statute then authorizes HUD to approve subsidized housing proposals, even over local governmental objections, if the Secretary finds the proposals to be "consistent" with the plan. 42 U.S.C. §1439(a)(2). Where the local government has not applied for Title I community development funds HUD is empowered to proceed with subsidized housing subject only to its own determination that there is a need for the proposed housing and that adequate facilities and services are available. 42 U.S.C. §1439(c).

meeting the needs for federally subsidized housing. (Hearings, Subcommittee of the Committee on Appropriations, House of Representatives, 94th Cong. 1st Sess., Part 5, April 14, 1975, pp. 119-20.)

Even with respect to the pre-1974 housing programs, however, where as the Government correctly points out the statutory scheme effectively gives units of general local government a veto power over subsidized housing programs within their borders (by requiring a cooperation agreement for conventional and turnkey public housing, 42 U.S.C. §1415(7)(b), and an authorizing resolution for leased housing, 42 U.S.C. §1421b(a)(2)), that fact no more bars relief in the suburban portion of the market area than it did in Chicago. The City of Chicago, which has never been charged with or adjudicated liable for the HUD-CHA discrimination, retains the power to refuse to enter into cooperation agreements with CHA and to refuse to pass authorizing resolutions for leased housing respecting the pre-1974 housing programs. Yet it has never been suggested that on that account relief against HUD within the City of Chicago should not have been granted with respect to those programs. No more should such a possibility preclude relief against HUD elsewhere in the housing market area.

In sum, the contention that the statutory scheme creates a practical difficulty by reserving to local communities the decision whether to participate in federally subsidized housing programs is factually inaccurate as to all three forms of the housing assistance program (new construction, substantial rehabilitation and existing housing) which now constitute the major current federally subsidized housing activity, and—as the Chicago situation illustrates --affords no reason for denying metropolitan relief even as to the older programs.

It is, indeed, an aspect of HUD's own argument, not metropolitan relief, that runs counter to Congressional policy. The petition says that "uncertainty" caused by this case may discourage participation by suburban jurisdictions in federal programs. The "chilling effect" is ascribed to the fear that, because an implication of the decision below is that some federally assisted housing for central city residents may be located in suburban areas, suburbs may be deterred from participating in federal programs. (Petition 8-10.) The argument is repeated in somewhat attenuated form in the Government's brief on the merits. (Br. 30-31.) Apart from its inaccuracy,* the Government's argument conflicts with the policy of the 1974 Act favoring the dispersal of low-income housing outside central cities. The initial Congressional finding is that urban communities face critical problems in part because of "the concentration of persons of lower income in central cities." 42 U.S.C. §5301(a)(1). "[T]he spatial deconcentration of housing opportunities for persons of lower income . . ." is among the law's primary objectives. 42 U.S.C. §5301(c)(6).

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* Since housing funds are applied for and housing projects are operated by housing developers, public or private, the failure of a suburban community to apply for quite separate community development funds, 42 U.S.C. §5.01 et seq., would not preclude HUD from supplying funds to housing developers for federally subsidized housing designed to house central city residents in that community. In such a case the suburban community is entitled to furnish HUD with "comments or information," but the final determination as to whether housing is to be provided is to be made by HUD. 42 U.S.C. § 1439(c). It would be a mistaken suburban community that decided not to participate in the community development block grant program because it believed it might thereby prevent housing developers from providing federally supported housing within its borders.

Housing needs of lower-income persons are to include not only the needs of residents but of those "expected to reside" in the community as well. 42 U.S.C. §5304(a)(4)(A). Of this provision the key legislative committee report says:

> "The committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well." (Report No. 93-1114, House of Representatives, 93d Cong. 2d Sess., p. 7.)

Elsewhere HUD has acknowledged this policy of the 1974 Act, as shown by the following quotations from a recent speech respecting the Act by HUD Secretary, Carla A. Hills:

> "The undue concentration of poor people in a central city may only be capable of mitigation on a region-wide basis."
>
> ". . . the Act itself embodies a concept of regionalism, necessitated by the modern realities of regional growth and development."
>
> "There will be communities which will strongly oppose efforts to place their interests in the larger mosaic of our metropolitan areas. Strong opposition will meet efforts to take away a town's enjoyment of the benefits of economic development without sharing its burden of housing the low-income families who are employed by its industries. But rational metropolitan development will be furthered, and I think eventually our efforts will be applauded." (HUD News, May 28, 1975, Remarks Prepared for Delivery by Carla A. Hills, pp. 2, 7.)

To the extent the decision below looks toward the provision of housing opportunities for low-income central city residents outside the central city, it is thus entirely consistent with the policy of the law.*

Costs and Burdens. The next practicality argument of the Government is that a metropolitan remedial order would subject suburban governments to substantial costs and burdens, all under judicial supervision, and that the number of governmental units thus subjected to judicial supervision would be so large as to render the task unmanageable. (Br. 35-37.) The short answer is that *no* suburban governmental units would be subjected to judicial supervision as a result of a metropolitan remedial order against HUD. No "equitable [or other form of] relief against them" would be involved. (Br. 35, n.30.) It bears repeating that the Government erects a straw man when it suggests that suburban governments would be parties to, or necessarily involved in, a metropolitan remedial decree against HUD. By contract with private developers, public developers (local housing authorities) or private landlords, HUD would carry out such a decree. No decree against suburban governmental units would be required any more than a decree against the City of Chicago was required as part of the remedial orders in Chicago.

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* The petition's argument would seem to translate as follows: If the ruling of the court of appeals stands, suburbs may get the impression that they may have to house some central city low-income people and this impression will deter them from allowing federally supported housing within their borders and from applying for community development block grants. Therefore the Court must dispel this erroneous impression so that community development grants and housing subsidies can flow to suburbs that house only their present residents. Compare this with the quotation from the President's Report on National Housing Goals, *supra*, p. 10.

Neither are the supposed costs and burdens of a remedial decree any more relevant as respects suburban governmental units than they were as to Chicago. No contention was (or justifiably could have been) advanced that intra-city relief was precluded by any costs or burdens that might fall upon the citizens of Chicago as a result of housing developers providing remedial housing within the city. Neither is such a contention sound as regards remedial housing provided elsewhere in the market area.

In fact, moreover, the supposed costs and burdens are largely imaginary. Under the 1974 Act housing assistance programs they are non-existent. Any housing provided under those programs pays its full share of local real estate taxes and, save for the federal subsidy provided on behalf of the beneficiary family, is indistinguishable from non-subsidized housing. Such housing creates no different costs or burdens for any local government than would be created by the erection of the identical housing without federal subsidies. The same is true of the leased housing program. Only in the conventional and turnkey programs is the housing entitled to a special status—it is exempt from real estate taxes. Although a payment in lieu of such taxes is provided for,* a suburban government that considered the payment insufficient could simply refuse to execute a cooperation agree-

*42 U.S.C. §1410(h). "The CHA receives no tax funds from the City of Chicago . . . In lieu of taxes, CHA pays to the County Treasurer 10% of all shelter rents charged (rents exclusive of utility costs). Historically, the payments have been more than private owners were billed in real estate taxes the year before the properties were purchased by CHA and redeveloped with public housing." (1971 CHA Annual Report, p. 37, CHA Quarterly Report No. 5, Attachment No. 5, Record Doc. 274.)

ment and thereby avoid the "burden." Again, this possibility supplies no reason for excusing HUD from its remedial obligations respecting its exercise of its own powers.

In short, no suburban municipalities would be party to a metropolitan remedial decree against HUD, none would be subjected to judicial supervision by the entry of such a decree, and none would be subjected to costs or burdens as a result of it.

Allocation of Housing. Finally, the Government asserts that there will be difficulty in determining what proportion of remedial housing units is to be made available to the plaintiff class as against other eligible persons not members of the class. (Br. 38.) This "problem" existed with respect to the City also, for many eligible persons had been deterred from applying for public housing by the HUD-CHA discrimination. (296 F.Supp. at 915.) Yet the need to take their legitimate interests into account was of course not viewed as a reason to deny relief altogether to the plaintiff class. The remedial city order accommodated the interests of both groups by providing that at least 50% of the remedial housing should be offered to members of the plaintiff class and that the balance could be made available to other income eligible persons. (304 F.Supp. at 740.) The 50% figure is of course not magical; the point is that the need to select some figure (or figures—presumably it need not be the same throughout the housing market area) is hardly a reason to deny *any* metropolitan relief.*

*The Government argues that suburban public housing applicants are entitled to the protection of the doctrine that 1964 Civil Rights Act sanctions are to be limited to the particular political entity and program involved in a violation of the Act. (Br. 18-19, n.15.) A remedial

The practical problems to which the Government refers are thus illusory, and in good part rest upon the false suggestion that a metropolitan decree against HUD would entail relief against and judicial supervision over suburban municipalities.

Contrasting with this absence of problems militating against metropolitan relief, the equitable principle of effective relief as embodied in *Louisiana, supra*—"so far as possible [to] eliminate the discriminatory effects of the past"—strongly supports a housing market wide order against HUD. So do the commands of *Davis* v. *Board of School Commissioners*, 402 U.S. 33, 37 (1971), to "use . . . all available [remedial] techniques," and of *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 46 (1971), that "all reasonable [remedial] methods be available." So do other considerations, such as national housing objectives, HUD's oft-expressed views favoring metropolitan remedies for housing segregation both generally and in the specific context of this case, and HUD's recognition of the housing market area as the relevant geographic unit with respect to the problem of minority concentration in central cities. So also does the lack of sufficient suitable land in the general public housing area of Chicago. In the proceedings before a special master appointed to assist the district judge in implementing the remedial orders, CHA has previously

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• (Continued)

order directed to HUD's administration of subsidized housing programs in the Chicago Housing Market Area *would* be so limited. Apart from that, however, the doctrine relates to the termination or refusal of financial assistance, not to the establishment of funding criteria that would have general applicability, here throughout the housing market area. 42 U.S.C. §2000d-1.

indicated that there may not be enough vacant, residentially zoned parcels left in the general public housing area of the City of Chicago to enable it to supply even the minimal first stage (1500 units—see 436 F.2d 306) of remedial housing, and a recent extensive land survey, the results of which were reported to the master on September 8, 1975, confirms that fact. (Report of Special Master for Period March 3, 1975 to September 3, 1975, September 11, 1975, p. 19.)•

Under all of these circumstances, nothing in *Milliken* or other decisions of this Court requires confining a desegregation decree against HUD to a restricted portion of a housing market area when to do so, as the court of appeals has found, would drastically limit the effectiveness of the decree.

• • •

The separate question of extending metropolitan relief to CHA, or to CHA and other local housing agencies in the housing market area, is not now before the Court. CHA has not sought review of the court of appeals order and other housing agencies may or may not be included in a final remedial decree. Pursuant to the order of the court of appeals for "further consideration of the issue of metropolitan area relief" the district court has per-

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• The shortage of available, suitable land for housing in what the President has called "land-short central cities" (*supra*, p. 10), and the relative abundance of such land in suburban areas, are widely recognized. See, e.g., the Report of the President's Committee on Urban Housing, Technical Studies, Volume II, (G.P.O. 1968), pp. 295 et seq. ("The overwhelming proportion of the urban land base is located outside of central cities, in their surrounding suburbs"—p. 347.) As to Chicago in particular, see pp. 329-31, 338-39. ("Chicago's vacant land supply [is] too small to permit development of more than a token number of low- and moderate-cost units . . ."—p. 330.)

mitted the joinder of other state-created housing agencies operating in the Chicago Housing Market Area, but a final metropolitan remedial order might, as already discussed, be confined to HUD, or might be limited, as now to be considered, to HUD and CHA.* However, because the Government's brief is directed almost exclusively to the issue of metropolitan relief against state-created housing agencies, we deal briefly here with that question. It should be emphasized nonetheless that quite apart from our view that metropolitan relief may properly be extended to CHA, or to CHA and other local housing agencies, housing market area relief directed only against HUD would remain a practical option available to the district judge.

If metropolitan relief were to be extended to CHA, for example, by setting aside the state statute which precludes CHA from operating outside Chicago without

* This does not mean that relief *should* be confined to HUD, or to HUD and CHA, but only that those options are available to the district judge. If the district judge should choose to so limit relief, deference to the Congressional mandate of local responsibility would nonetheless dictate that local housing agencies in the market area participate in formulating the remedial criteria to the extent they desire to do so. In addition, *Milliken* suggests that no metropolitan remedial steps be taken before a full opportunity has been afforded such agencies to assert any agency interests they believe may be affected by such steps, whether or not they choose to participate in the planning. Responsive to these considerations, as well as to those discussed in the text *infra*, the district judge has permitted a supplemental complaint to be filed which joins the housing market area state-created housing agencies. (App. 211)

the consent of others,* the practical and legal situation would still be totally unlike the circumstances the Court confronted in *Milliken*. The boundaries of one local agency —CHA—would in a technical sense be "set aside." But no other local agency would be required to do, or to refrain from doing, anything at all, a significant difference from the *consolidation* of local school districts proposed in *Milliken*. And Illinois law already recognizes that housing low income families is a matter of metropolitan scope. Under Illinois statutes the normal area of operation of a city public housing agency extends three miles into any unincorporated area beyond the city boundary, while the normal area of operation of a county public housing agency embraces the entire county, including any cities within it (subject in both cases to exceptions where other public housing agencies already exist). Ill.Rev.Stat. ch. 67-½, §§3, 17(b). In addition, Illinois public housing agencies may exercise their powers jointly within the area of operation of any one of them, and may operate outside their own areas of operation by contract with other public housing agencies or state public bodies. Ill.Rev.Stat. ch. 67-½, §27c. Of provisions such as these HUD's General Counsel has said:

> "The provisions in State housing authorities laws which authorize a city housing authority to operate

* Nothing more would be required than an order setting aside for the limited remedial purposes of this case the state statute which presently precludes CHA from so acting. Ill.Rev.Stat. ch. 67-½, §27c. Such a form of relief would be closely analogous to an order entered previously in this case, 342 F.Supp. 827, aff'd 480 F.2d 210, cert. denied 414 U.S. 1144, which similarly freed CHA from the fetters of a state statute—which had required CHA to obtain Chicago City Council approval before acquiring real property—found to be obstructing full and effective relief.

> in an area 5 or 10 miles beyond the city's limits and which authorize it to operate in a county or other city with the consent of the governing body concerned, were included in these laws because it was realized that many cities would have to utilize the areas outside their borders in meeting their low-rent housing needs. It was recognized that the elimination of slums and the provision of decent housing for families of low income in the locality are matters of metropolitan area scope but of primary concern to the central city because the problem and impact are intensified there. In effect, therefore, *the State legislatures have determined that the city and its surrounding area comprise a single 'locality' for low-rent housing purposes.*" (Plaintiffs' Exhibit 13, pp. 3-4, emphasis supplied.)

There was no counterpart in *Milliken* to such a determination by the Illinois legislature.

Neither would the Court be dealing with an autonomous local agency such as the local school boards involved in *Milliken*. Instead of local autonomy long thought to be essential to public schooling, 418 U.S. at 741, under the housing assistance program primary responsibility for program administration and authority to contract for the development of subsidized housing independently of local housing agencies has been given to HUD. Even in the case of housing provided jointly by HUD and local housing agencies, local autonomy is severely limited: it is "centered around budget control, audits, rents and eligibility requirements," includes "far less than full control" even as to those matters, and "was not intended to preclude HUD from making rules of broad national policy" or "to regulate matters involving broad national policy." (HUD's Brief in the Eighth Circuit in *Omaha, supra,* Nos. 72-1102 and 72-1185, pp. 25, 19, 21.)

As a consequence, the four equitable considerations of practicality and judicial manageability that were of such

concern in *Milliken* would still be entirely absent or markedly attenuated if metropolitan relief were extended to CHA. For the deeply rooted tradition of local control over schools involved in *Milliken* would be substituted a tradition—intensified in 1974—of overall federal supervision and ultimate federal responsibility for the operation of federal housing programs, together with a specific withdrawal of state supervisory powers over federally supported projects. As in the case of relief confined to HUD, there would be no transportation of persons or consolidation of local governmental systems involved at all. And instead of a complete restructuring of state school laws, a limited suspension of a single state statute would permit CHA to provide housing throughout the market area, something state law already authorizes it to do with the consent of, or jointly with, others.

Even if metropolitan relief were to be extended to other local housing agencies operating within the Chicago Housing Market Area—for example, by directing them to use their best efforts to provide remedial housing within their respective areas of operation, just as CHA is already directed to do within Chicago—concerns about practicality and judicial manageability would similarly remain minimal. As in the case of a metropolitan order directed to CHA, there would still be no transportation ordered and no systems consolidated. Control over local housing agency operations would remain unchanged, subject only to the best efforts requirement. No laws would be restructured—local housing agencies would continue to operate in the same areas as at present. Since a federal equity court has the power to require subdivisions of the state to assist in the vindication of federal constitutional

rights infringed by state agencies,* and since the equitable considerations militating against such action in *Milliken* are largely or wholly absent here, the extension of metropolitan relief to other local housing agencies than CHA would thus also lie within the equitable powers of the court.

CONCLUSION

This case should not be decided by the invocation of a phrase, "inter-district," and speculation as to the provisions of a remedial decree. In *Milliken* the meaning and application of "inter-district" were clear. Whatever precise form the decree might take, at issue was the propriety of consolidating substantially autonomous local school districts for the purpose of making mandatory pupil assignments that would affect large numbers of innocent persons. Here, in the markedly different context of federal housing programs, where no consolidation of local governmental units or coercion respecting individuals is involved, the term "inter-district" obscures the issue if it is uncritically employed to refer to a legal structure and to practical considerations that are wholly unlike those considered by this Court in *Milliken*. Here HUD has itself determined that the housing market area is the appropriate geographic area for addressing the problem of remedying the effects of past housing discrimination presented in this case. Here also there is evidence both of discrimination by HUD in suburban areas and of the impact of such discrimination across city-suburban lines.

* See authorities cited in the court of appeals opinion below, 503 F.2d at 934. The power was assumed *arguendo* in *Milliken*, 418 U.S. at 748.

Finally, an array of factors here supports some form of metropolitan relief not only as an "available technique," *Davis* v. *Board of School Commissioners, supra,* but, as HUD itself virtually acknowledges, as an essential tool to provide an effective remedy for the persistent effects of federal constitutional and statutory violations. The decision of the court of appeals should therefore be affirmed so that appropriate and effective remedial arrangements can be explored by the district court with the traditional flexibility, subject to the traditional limitations, of equity powers.

Respectfully submitted,

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September, 1975

APPENDIX A

List of Some Metropolitan Remedial Possibilities

1. HUD to condition the availability of housing subsidy funds allocated to the Chicago Housing Market Area upon criteria respecting location and availability to the plaintiff class similar to those now in force in Chicago.

2. HUD to use its best efforts to see to it that housing subsidy funds allocated to the Chicago Housing Market Area are in fact utilized by housing developers.

3. Ill.Rev.Stat. ch. 67½, §27c, to be set aside as to CHA for the remedial purposes of the case, thereby authorizing CHA to provide remedial housing within the Chicago Housing Market Area, and CHA to be ordered to use its best efforts to do so.

4. Other state-created housing agencies operating federally subsidized housing programs within the Chicago Housing Market Area to be ordered to use their best efforts to provide remedial housing within the Chicago Housing Market Area subject to criteria respecting location and availability to the plaintiff class similar to those now in force in Chicago.

5. The Illinois regional planning agency having jurisdiction over the Chicago Housing Market Area to be ordered to assist HUD by providing a locally prepared plan respecting distribution of remedial housing within the Chicago Housing Market Area.*

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*The Northeastern Illinois Planning Commission (NIPC), a state-created regional planning agency, has jurisdiction by Illinois law over the identical area which comprises the Chicago Housing Market Area. Ill.Rev.Stat.

This list of remedial possibilities suggests the variety of options open to the district court on remand. Thus, housing market area relief could be confined to the first option, or to the first and second, or to the first, second and third, and so on. None of the options, singly or in combination, involves the consolidation of any local government entities for administrative or other purposes, or precludes or interferes with the continued independent operation of local housing agencies. Relief confined to the first option, or to options one and two, would provide substantially the relief in the housing market area that has been afforded in Chicago without involving local housing agencies at all, and options one, two and three would provide the identical relief in the housing market area that has already been afforded in Chicago without involving local housing agencies other than CHA.

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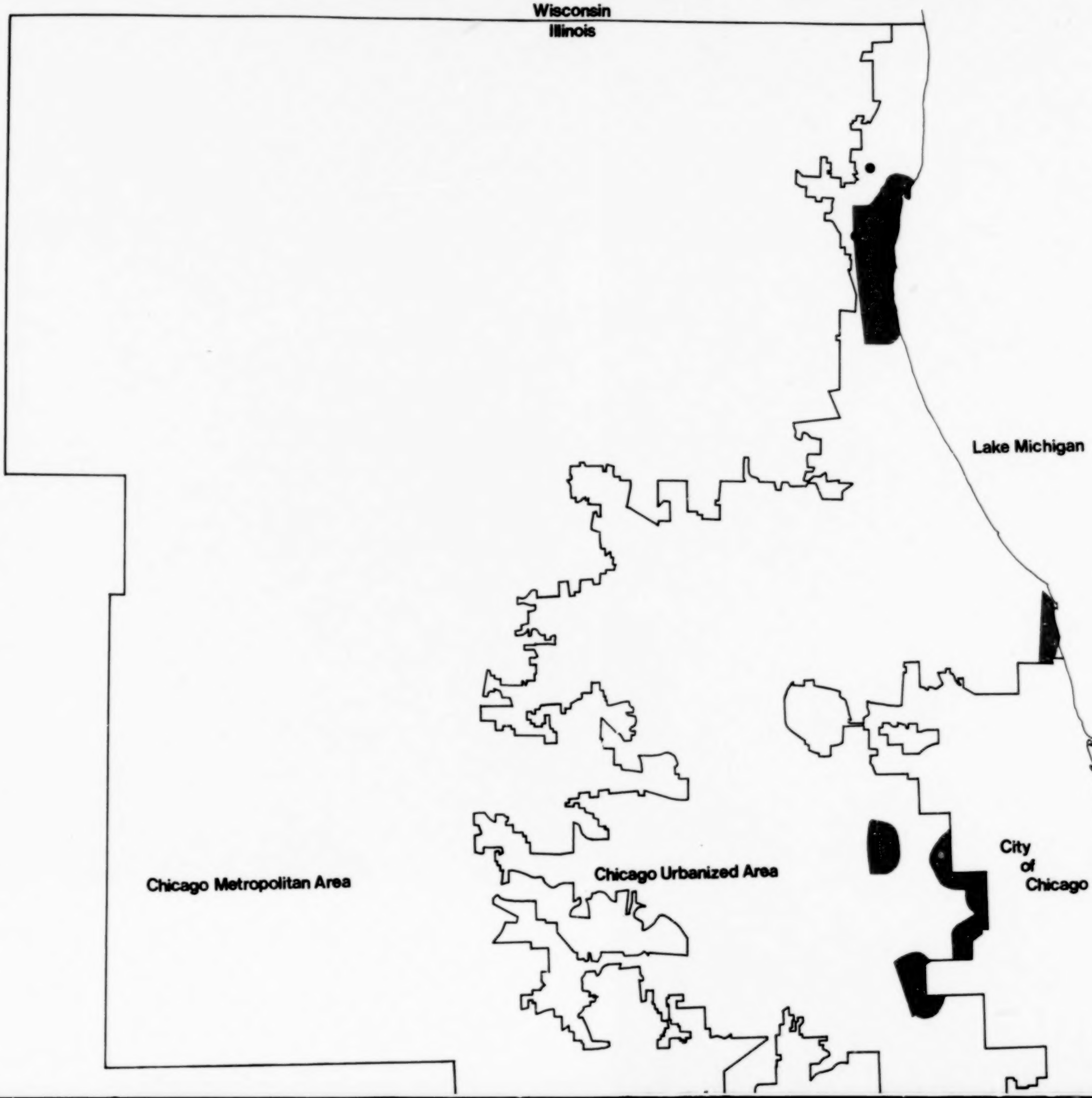
* (Continued)
ch. 85, §1103. NIPC is already required by federal statute to include a "housing element" in its regional planning activities, and receives HUD funds for this and other planning purposes. (App. B, pp. 18-23, to Response of George Romney, April 26, 1972.) HUD represented to the district court that at its request NIPC was already undertaking a study to identify suitable places within the housing market area for subsidized housing. (*Id.*, 23-24.)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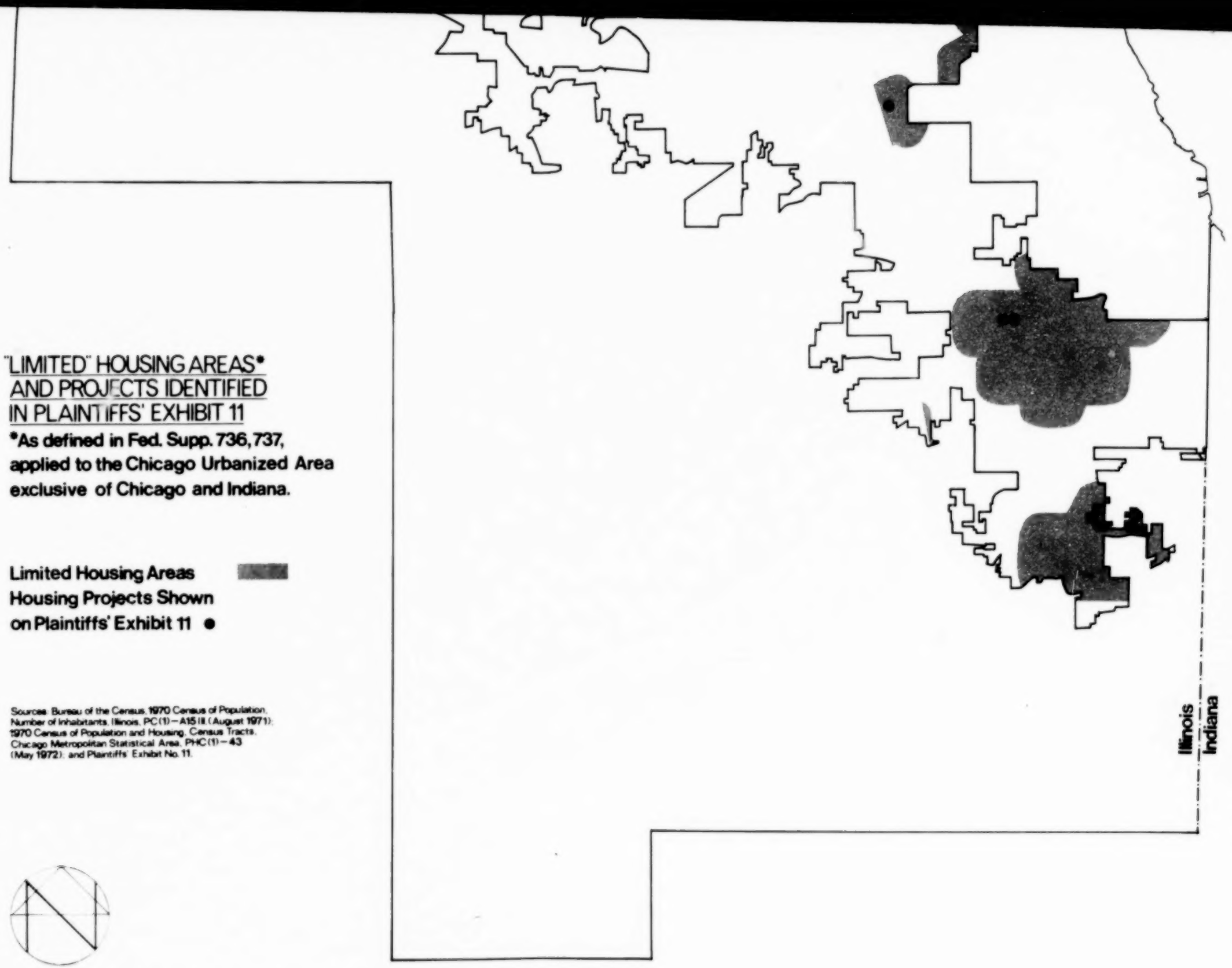

"LIMITED" HOUSING AREAS* AND PROJECTS IDENTIFIED IN PLAINTIFFS' EXHIBIT 11

***As defined in Fed. Supp. 736, 737, applied to the Chicago Urbanized Area exclusive of Chicago and Indiana.**

Limited Housing Areas

Housing Projects Shown on Plaintiffs' Exhibit 11 ●

Sources: Bureau of the Census, 1970 Census of Population, Number of Inhabitants, Illinois, PC(1)—A15 Ill. (August 1971); 1970 Census of Population and Housing, Census Tracts, Chicago Metropolitan Statistical Area, PHC(1)—43 (May 1972); and Plaintiffs' Exhibit No. 11.

N

appendix B

Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1047

CARLA HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Petitioner,

vs.

DOROTHY GAUTREAUX, ET AL.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE CITY OF JOLIET, ILLINOIS, AS AMICUS CURIAE.

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TABLE OF CONTENTS

PAGE

Interest of the City of Joliet 2

Argument:

I. It is Beyond the Equity Jurisdiction of a Federal Court to Order Inter-District Relief for Discrimination in Public Housing in the Absence of a Finding of an Inter-District Violation 3

II. Even if Inter-District Relief in the Absence of an Inter-District Violation Is Not Beyond the Equity Jurisdiction of a Federal Court, the District Court Properly Denied Inter-District Relief in This Case. 5

A. It is unreasonable for a federal court sitting in equity to impose the public housing needs of Chicago upon Joliet 5

B. It is impractical for a federal court sitting in equity to impose the public housing needs of Chicago on Joliet 8

Conclusion 11

TABLE OF AUTHORITIES.

Cases.

Gautreaux v. Chicago Housing Authority, 503 F. 2d 930 (C. A. 7, 1974), *reh. denied*, 503 F. 2d 939 4

Gautreaux v. Romney, 363 F. Supp. 690 (1973) 3

James v. Valtierra, 402 U. S. 137 (1971) 9

Lindsey v. Normet, 405 U. S. 56 (1972) 9

Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F. 2d 1087 (C. A. 6, 1974) 9

Millikin v. Bradley, 418 U. S. 717 (1974) 3, 5, 8, 9

Palmer v. Thompson, 403 U. S. 217 (1971) 10

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) 3, 10

Statute.

Illinois Revised Statutes, ch. 67½, § 3 10

Miscellaneous.

Bureau of Census, U. S. Dept. of Commerce, 1st Count Summary Tapes, Table P-20 (census tract 8825) 4, 11

Bureau of Census, U. S. Dept. of Commerce, 1960 Census of Population and Housing, Final Report PHC (1)-26, Table P 1 4

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The Future of Existing Neighborhoods (Joliet, Illinois: Planning Division, 1975) 5, 7

The Need to Explore Additional Housing Program Alternatives (Joliet, Illinois: Planning Division, 1974) . . 5, 6, 7, 8

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE CITY OF JOLIET, ILLINOIS, AS AMICUS CURIAE.

This brief *amicus* in support of the Petitioner is filed for the City of Joliet, a political subdivision of the State of Illinois, by James M. P. D'Amico, Corporation Counsel of the City of Joliet as provided for by Rule 42(4) of the Rules of this Court.

INTEREST OF THE CITY OF JOLIET.

The City of Joliet is a Municipal Corporation, a subdivision of the State of Illinois. Per order of the United States District Court, Northern District of Illinois, Eastern Division, dated February 24, 1975, the Housing Authority of Joliet was made a party defendant to this action. The jurisdiction of the Housing Authority of Joliet is coterminus with that of the City.

Unless the opinion of the Seventh Circuit is reversed, the Housing Authority of Joliet, *inter alia*, will be charged with carrying out the *Gautreaux* decree. The City believes that this would have seriously detrimental ramifications throughout the City and would adversely affect the ability of the City to function as a municipal corporation.

ARGUMENT.

I.

IT IS BEYOND THE EQUITY JURISDICTION OF A FEDERAL COURT TO ORDER INTER-DISTRICT RELIEF FOR DISCRIMINATION IN PUBLIC HOUSING IN THE ABSENCE OF A FINDING OF AN INTER-DISTRICT VIOLATION.

At issue in this case is racial discrimination in public housing within the City of Chicago. Discrimination within the City of Joliet is not at issue. Furthermore, as the District Court found, "It has never been alleged that CHA (Chicago Housing Authority) and HUD (Department of Housing and Urban Development) discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claims could never be proved against the principal offender herein." *Gautreaux* v. *Romney*, 363 F. Supp. 690, 691 (1973).

The equitable powers of a Federal District court to do justice are broad and flexible but they are not boundless. The remedial power to do equity may be exercised "only on the basis of a constitutional violation" and "the nature of the violation determines the scope of the remedy." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15, 16 (1971).

The district court found a constitutional violation in this case —but a violation solely within the City of Chicago against Chicago residents. There has been no showing of a constitutional violation within the City of Joliet or that the violation in Chicago produced any segregative effect in Joliet. The nature of the constitutional violation is intra-district segregation, the scope of the remedy must be limited to that district. "(W)ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." *Millikin* v. *Bradley*, 418 U. S. 717, 745 (1974).

Analysis of population trends in the City of Joliet supports the wisdom of confining the remedy to the City of Chicago and for rejecting the speculative conclusion of the court of appeals "That defendant's discriminatory site selection within the City of Chicago may well have fostered racial paranoia and encouraged the 'white flight' phenomenon which has exacerbated the problems of achieving integration to such an extent that intra-city relief alone will not suffice to remedy the constitutional injuries." *Gautreaux* v. *Chicago Housing Authority*, 503 F. 2d 930, 940 (C. A. 7 1974).

The concept of "white flight" posits the out-migration of large numbers of whites from the central city to the suburbs with the result that the central city becomes "blacker" while the suburbs become "whiter." Over the decade 1960-1970, Joliet's white population increased from 62,077 to 70,504, an increase of 13.6 percent. The black population increased from 4,638 to 9,507, an increase of 105 percent! Joliet, in 1960, was 93 percent white and 6.9 percent black; in 1970, it was 87.7 percent white and 11.8 percent black.[1] These figures hardly support the conclusion that Joliet was on the receiving end of "white flight" out of Chicago.

It was highly improper for the court of appeals to reverse on the basis of speculation as to an inter-district violation when such was neither alleged nor proved. The district court's finding was not clearly erroneous and, in light of *Bradley* v. *Millikin*, it is beyond the equity jurisdiction of a federal court to order inter-district relief for discrimination in public housing in the absence of an inter-district violation.

1. Bureau of Census, U. S. Department of Commerce, 1960 Census of Population and Housing, Final Report PHC (1)-26, Table P 1; Bureau of Census, U. S. Department of Commerce, 1970 Census of Population and Housing, Final Report PHC (1)-43, Table P 1.

II.

EVEN IF INTER-DISTRICT RELIEF IN THE ABSENCE OF AN INTER-DISTRICT VIOLATION IS NOT BEYOND THE EQUITY JURISDICTION OF A FEDERAL COURT, THE DISTRICT COURT PROPERLY DENIED INTER-DISTRICT RELIEF IN THIS CASE.

The court of appeals interpreted *Millikin* v. *Bradley* "to hold that the relief sought there would be an impractical and unreasonable over-response to a violation limited to one school district." 503 F. 2d at 935-36. We submit that *Millikin* did not deal merely with "equitable limitations on remedies," *id.* at 936, but even if it did, inter-district relief is improper in this case.

A. It Is Unreasonable for a Federal Court Sitting in Equity to Impose the Public Housing Needs of Chicago Upon Joliet.

The Department of Community Development of the City of Joliet has stated as a goal to the City to "Provide the opportunity for all Joliet households to live in decent housing."[2]

At present, a total of 1483 units, or about 5.5 percent of Joliet's total housing stock is low and moderate income, publically subsidized housing.[3] Additionally, the City has a projected need for 1774 more low-income units by the year 1980.[4]

While Joliet is actively striving to satisfy its own low-income housing need,[5] the City is presently operating at a $2,102,000

2. *Goals for Joliet* (Joliet, Illinois: Planning Division, 1973), p. 11.

3. *The Need to Explore Additional Housing Program Alternatives* (Joliet, Illinois: Planning Division, 1974), p. 3. It has been estimated that on a per capita basis, Joliet has four and one-third times as many public housing units as Chicago. *Id.*

4. *The Future of Existing Neighborhoods* (Joliet, Illinois: Planning Division, 1975), p. 4.

5. The City's application under Title I of Housing and Community Development Act of 1974, 42 U. S. C. 5301 *et seq.*, was approved by HUD area office as of June 18, 1975.

deficit[6] and any perception that Joliet constitutes a part of Chicago's suburban bed of affluence is grossly erroneous. The application of a 1.0 percent tax rate in Chicago yields revenues of $39.15 per capita. The same rate applied in Joliet yields only $33.80 per capita.[7]

Although the court of appeals recognized the element of reasonableness inherent in equity jurisdiction, it nevertheless ordered the formulation of an inter-district remedy with a view only to the needs of the residents of the district where the constitutional violation occurred. It was patently unfair and unreasonable for the court of appeals to reverse the district court sitting in equity and to order no-fault remedial participation of suburban housing authorities without consideration of the general welfare of the residents of the suburban communities. The imposition of Chicago's public housing needs upon communities already as financially strapped as Joliet will have profound and perhaps disastrous results.

As stated previously, Joliet's public housing need *for its own residents* has been calculated to be 1774 units by the year 1980. While this need is quite sizable considering that only 1483 such units exist presently, it is dwarfed by Chicago's need of 67,000 units by the year 1980.[8] Providing for even a fraction of Chicago's need in Joliet would undoubtedly require massive construction. Yet no federal program now provides funds for new construction. Should Joliet be ordered to favor Chicago's needy over its own as to existing and planned housing opportunities? We submit that our federal system of government precludes such an order.

6. Approximate current deficit. Conversation with Richard Yucius, General Accountant, City of Joliet, July 1, 1975.

7. *The Need to Explore Additional Housing Program Alternatives, supra* at 2. Source: Table VI, *Illinois Property Tax Statistics,* 1971 (Department of Local Government Affairs, State of Illinois) and the *1970 Census of Population and Housing* (U. S. Department of Commerce).

8. *Moderate and Low-Income Housing, A Ten Year Estimate of Regional Needs;* Northeastern Illinois Planning Commission, 1973 (Preliminary) table 1C, p. 12.

Even if the cost of new construction is borne by the Chicago Housing Authority or by the federal government, who will pay for new sewers, new waterlines and new streets? These will be the responsibility of the City of Joliet. The cost could hardly be passed along to the immigrants from Chicago; if they could afford such special taxes, they would not be in need of public housing.

The indirect costs of housing Chicago's indigent may be even more staggering. It has been estimated that the average added tax burden of each new schoolchild upon local housing in 1970 was about $311.00.[9] To use this estimation, if Joliet is allocated but 500 housing-needy families from Chicago, each with two children, the annual tax deficit would come to $311,000.00. The effect of such a burden upon Joliet's already weak tax base could be disastrous.

The additional demand on police and fire protection will also be profound. Poor persons are disproportionately the victims of crimes against persons and property. This is true in Joliet as throughout the nation.[10]

The high crime rate within public housing projects is criticized by foes of public housing and tenants alike.[11]

The census tracts in Joliet where public housing projects are located show the highest incidence of crimes against persons and property and the highest incidence of building fires.[12]

Joliet already experiences a markedly higher crime rate than the Chicago Metropolitan area, a large influx of indigent families

9. A. Downs, *Opening Up the Suburbs,* 53 (Yale University Press, 1973).

10. *The Future of Existing Neighborhoods, supra. Compare* Map 4 "Low Household Income," p. 107, *with* Map 12 "Crimes Against Persons and Property," p. 111.

11. Cooper, *Resident Dissatisfaction in Multi-Family Housing* Institute of Urban and Regional Development, University of California, Berkeley, 1972 Working Paper No. 160, p. 6.

12. *Compare The Future of Existing Neighborhoods, supra,* Maps 12 and 13, p. 11, *with The Need to Explore Additional Housing Program Alternatives, supra,* Map 4, p. 13.

without any new funds for police protection will likely send the crime rate soaring even higher.[13]

Low-income households have additional needs for which they must look to local government. These include, by way of example, public transportation, income maintenance, family counseling, manpower training programs, unemployment compensation and counseling and low-cost health care.[14] Even if funds to satisfy these needs come from federal or state sources, local government often administers the programs.

The district court refused to order metropolitan relief to remedy the discrimination against the Plaintiff's. The constitutional violation occurred solely in the City of Chicago. Yet as a result of a wrong for which the suburbs were in no way responsible, they now face the immense burden of housing Chicago's poor. The gravity of such a burden on Joliet is uncalculable. It threatens a financially-weak city with financial collapse. Taking into account the element of reasonableness inherent in equity jurisdiction, the court of appeals acted improperly in finding the district court's decision to be clearly erroneous.

B. It Is Impractical for a Federal Court Sitting in Equity to Impose the Public Housing Needs of Chicago on Joliet.

The court of appeals distinguished *Millikin* on the ground that "[T]he administrative problems of building housing outside Chicago are not remotely comparable to the problems of daily bussing (sic) thousands of children to schools in other districts run by other local governments." 503 F. 2d at 936. The absurdity of this statement is apparent at once when consideration is given to the realities of the construction of tens of thousands of new

13. In 1971, the crime rate in Joliet was 3,346 offenses per 100,000 capita; in the Chicago Metropolitan area (including Chicago and Joliet) the crime rate was 2891.4 offenses per capita. *The Need to Explore Additional Housing Program Alternatives, supra* at 4. Figures derived from tables in *Crime in Illinois*: 1971 (Department of Law Enforcement, State of Illinois).

14. A. Downs, *supra* at 56.

housing units for tens of thousands of Chicago residents assigned to public housing located many miles from their previous homes and jobs.

As stated previously, there are *no* federal programs providing funds for new construction. A federal court order for new construction would entail re-writing the federal housing program. An order that Joliet must favor Chicago's needy over its own with respect to existing and planned units, even if constitutional, would require the development of entirely new criteria for placement in public housing.

An inter-district remedy would require, in essence, the formulation of a metropolitan housing authority directed by the federal courts. Are federal courts any more able to administer a public housing authority for the entire Chicago metropolitan area than to supervise the schools in the Detroit metropolitan area, as was in issue in *Millikin?*

A metropolitan public housing remedy will throw the federal courts into the governmental processes of each of the suburbs where housing is to be located. Can a federal court direct the construction of new schools, streets and sewers? Hire additional police officers and firemen? Restructure the property tax structures? Provide transportation for public housing tenants to commute the 45 miles from Joliet to jobs in Chicago? These are tasks that federal courts simply cannot perform. The administrative impracticalities of an inter-district remedy would hinder effective government at local, state and federal levels.

A metropolitan remedy will likely have another undesirable result in that suburbs will be discouraged from offering public housing. There is no constitutional right to adequate housing. *Lindsey* v. *Normet,* 405 U. S. 56 (1972). Public housing is primarily a local option program. *James* v. *Valtierra,* 402 U. S. 137 (1971). Suburban municipalities have no obligation to enter the field of public housing for the benefit of residents of the core city. *Mahaley* v. *Cuyahoga Metropolitan Housing Authority,* 500 F. 2d 1087 (C. A. 6, 1974).

The suburban housing authorities made parties to this suit per order of the district court on February 24, 1975, were created by local government bodies.[15] *Palmer* v. *Thompson*, 403 U. S. 217 (1971), suggests that a municipality could constitutionally abolish its housing authority if the public housing created undue burdens on the local treasury. The influx of tens of thousands of public housing tenants from Chicago will create great demands for increased public services in the suburbs. A suburb which has attempted to house its own needy may be forced, out of financial necessity, to abandon its public housing venture entirely.

Similarly, a community considering the creation of a housing authority will likely be quite hesitant to do so if such means housing Chicago's needy as well as their own.

There is a final reason why inter-district relief is impractical. The reason is that a metropolitan plan misses the mark of remedying *proven* discrimination in public housing within the City of Chicago. As the district court observed, inter-district relief "would let the principal offender, CHA, avoid the politically distasteful task before it by passing off its problems onto the suburbs." 363 F. Supp. at 691.

The wrong in this case is discrimination in Chicago's public housing, not "white flight" into the suburbs. The two are not synonymous. It may be desirable that each public housing program across the nation have a particular racial balance. This policy decision is not, however, one for the federal courts when faced with intra-district discrimination. "The elimination of racial discrimination . . . is a large task and one that should not be retarded by efforts to achieve broader purposes. . . . One vehicle can carry only a limited amount of baggage." *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra* at 22.

Even if "white flight" were the evil at hand, an inter-district remedy would likely do no more than shift the location of the

15. Ill. Rev. Stat., ch. 67½ § 3.

launching pad. Approximately one-third of Joliet's family public housing units are located in a census tract that had a total population of 4899 in the year 1960 but only 3949 in the year 1970. The white population declined from 3654 to 1233 while the black population increased from 1564 to 2367.[16] Over the decade, the tract showed an approximate racial change from 75 percent white-25 percent black to 40 percent white-60 percent black. This is textbook "white-flight." It would be impractical, and indeed futile, to order inter-district relief aimed at "white-flight" only to shift the problem from Chicago to Joliet and other suburbs without any correction if the original wrong—racial discrimination within the City of Chicago.

CONCLUSION.

For the reasons presented, the decision below should be reversed.

Respectfully submitted,

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16. Bureau of Census, U. S. Dept. of Commerce, *1st Count Summary Tapes*, Table P-20 (Census Tract 8825).

Mr. D'Amico was assisted in the preparation of this brief by Mr. Stephen J. England, a senior law student at Boston University School of Law.

CERTIFICATE OF SERVICE.

This brief *amicus* has been served on Respondent by mailing copies thereof to Alexander Polikoff, Esq., 109 N. Dearborn Street, Chicago, Illinois 60602, and similarly on Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530 this 8th day of July, 1975.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

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v.

DOROTHY GAUTREAUX, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE

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INDEX

	Page
INTEREST OF THE AMICUS CURIAE	1
QUESTION PRESENTED	5
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. Because of the Significant Factual Differences Between *Milliken* v. *Bradley* and this Appeal, An Order Requiring HUD to Develop a Metropolitan Plan Is Not Precluded by the *Milliken* Decision	6
A. Parties Affected by the Order	7
B. Nature of the Order	8
C. "Inter-District" Relief	13
D. A Metropolitan Plan for Relief Is Both Desirable and Feasible	16
II. Development of a Plan for the Location of Low-Income Housing Outside Areas of Existing Minority Concentration Throughout the Metropolitan Area Would Be Consistent With Statutory Requirements Mandated by Congress and Endorsed by HUD in Its Own Regulations	17
III. An Order Requiring HUD to Develop a Metropolitan Plan for Relief Would Be Within the Equity Power of Federal Courts, as Approved by This Court and Lower Federal Courts	25
CONCLUSION	36

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *Richardson*, 356 F. Supp. 92 (D. D.C.) *aff'd* 480 F.2d 1159 (D.C. Cir. 1973) 30

Beneficial Finance Co. of Wisconsin v. *Wirtz*, 346 F.2d 340 (7th Cir. 1965) 28-29

Brennan v. *J. M. Field Co., Inc.*, 488 F.2d 443 (5th Cir. 1973), *cert. denied*, 419 U.S. 881 (1974) 28

Brown v. *Board of Education*, 349 U.S. 294 (1955) .. 27

Crow v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir 1972) 25

Curtis v. *Loether*, 415 U.S. 189 (1974) 2

Dailey v. *City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) 2

Gautreaux v. *Chicago Housing Authority*, 503 F.2d 930 (7th Cir. 1974) 2, 6, 8, 12-13, 15-16, 32-33

Hodgson v. *First Federal Savings and Loan Association of Broward County*, 455 F.2d 818 (5th Cir. 1972) 30

International Salt Co. v. *United States*, 332 U.S. 392 (1947) 26, 29

Jones v. *Mayer*, 392 U.S. 409 (1968) 2

Kennedy Park Homes Ass'n. v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S 1010 (1971) 2, 12

Louisiana v. *United States*, 380 U.S. 145 (1965) 27, 29

Milliken v. *Bradley*, 418 U.S. 717 (1974) 4-9, 12-16, 25-26, 34

Porter v. *Warner Holding Co.*, 328 U.S. 395 (1946) ..26-27

Reitman v. *Mulkey*, 387 U.S. 369 (1967) 2

SASSO v. *City of Union City*, 424 F.2d 291 (9th Cir. 1970) 2

Shannon v. *HUD*, 436 F.2d 809 (3d Cir. 1970) 22

J. P. Stevens & Co. v. *NLRB*, 380 F.2d 292 (2d Cir. 1967), *cert. denied*, 389 U.S. 1005 (1967) 29

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 4, 27

Times-Picayune Publishing Co. v. *U.S.*, 345 U.S. 594 (1953) 32

Page

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1973) 21

United Farmworkers v. *City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) 12

United States v. *City of Black Jack*, 508 F.2d 1179 (1974), *cert. denied*, 95 S.Ct. 2656 (1975) 12

United States v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), (*per curiam*) *cert. denied*, 389 U.S. 840 (1967) 30

United States v. *United States Gypsum Co.*, 340 U.S. 76 (1950) 26-28

United States v. *Ward*, 349 F.2d 795 (5th Cir. 1965) .. 30

Warth v. *Seldin*, —— U.S. ——, 95 S.Ct. 2197 (1975) 2

Wirtz v. *Ocala Gas Co.*, 336 F.2d 236 (5th Cir. 1964) .. 32

STATUTES:

Civil Rights Act of 1968, Title VIII, 42 U.S.C. 3601 *et seq.* 5, 21

United States Housing Act of 1937, 42 U.S.C. 1401 *et seq.* 9-10, 17

Housing and Community Development Act of 1974, 88 Stat. 633 *et seq.* 6, 9, 19, 20, 22

United States Code

42 U.S.C. 1402(2) 17
42 U.S.C. 1410(a) 18
42 U.S.C. 1415(7)(b) 10
42 U.S.C. 1421(b) 10
42 U.S.C. 1437f(b) 11
42 U.S.C. 1439(a)(2) 20
42 U.S.C. 1439(c) 20
42 U.S.C. 1441 5
42 U.S.C. 1441(a) 22
42 U.S.C. 1442(1)(b) 10
42 U.S.C. 2000d 21
42 U.S.C. 3601 21
42 U.S.C. 3608(d)(5) 21-22
42 U.S.C. 5301 19
42 U.S.C. 5304(a)(4) 19

	Page
Code of Federal Regulations	
24 C.F.R. 200.610	23
24 C.F.R. 200.700	23-24
24 C.F.R. 570.303(c)(2)	24
24 C.F.R. 570.601(e)(4)(ii)	23
24 C.F.R. 883.209(a)(3)	24
MISCELLANEOUS:	
Department of Housing and Urban Development, *Federal Housing Administration Techniques* (January 1970)	14
Department of Housing and Urban Development, *HUD Circular* 8030.2, revised, App. 2 June 1973)	23
H.R. Rep. No. 590, 81st Cong., 1st Sess. 16 (1949)	18
NCDH, *How the Federal Government Builds Ghettos* (1968)	3
6 Presidential Documents 424 (President's Statement on Equal Opportunity in Education, March 24, 1970)	4
6 Presidential Documents 666 (President's Message to Congress, May 21, 1970)	4
S. Rep. No. 84, 2 *U.S. Code Cong. and Ad. News* 1550 (1949)	18
United States Commission on Civil Rights, *Federal Installations and Equal Housing Opportunity* (1970)	34
United States Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974)	3
United States Commission on Civil Rights, *Housing* (1961)	3

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BRIEF AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

With the consent of the parties, the National Committee Against Discrimination in Housing, Inc. (NCDH) submits this brief *amicus curiae* in support of the plaintiffs-respondents, urging affirmance of the judgment of the Court of Appeals for the Seventh Circuit. That decision, rendered on August 26, 1974, is reported at 503 F.2d 930. It reversed an order of

the District Court which, in ordering the United States Department of Housing and Urban Development (hereinafter "HUD") to develop a remedial housing plan, limited its scope to the City of Chicago.

NCDH was founded in 1950 with the objectives of establishing and implementing programs to eliminate racial segregation and discrimination in housing and to broaden housing opportunities for minority group members, especially those of low-income. Since its inception, NCDH has carried out affirmative programs of research and education in the area of equal housing opportunity.

NCDH has complemented its research and education efforts with a vigorous legal program aimed at securing equal housing opportunity guaranteed under state and federal law. It has initiated litigation and participated as *amicus curiae* in numerous cases involving challenges to discriminatory housing practices and exclusionary land use controls. Among the important recent cases initiated by NCDH are *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970), and *SASSO* v. *City of Union City,* 424 F.2d 291 (9th Cir. 1970). Among the important recent cases in which NCDH has participated as *amicus curiae* are *Reitman* v. *Mulkey,* 387 U.S. 369 (1967), *Jones* v. *Mayer,* 392 U.S. 409 (1968), *Curtis* v. *Loether,* 415 U.S. 189 (1974), *Warth* v. *Seldin,* 95 S.Ct. 2197 (1975), and *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

In the course of its work, NCDH has examined and studied the demographic trends in the metropolitan areas of the nation. We have observed the accelerating racial and economic polarization between city and suburb. This has been mainly a phenomenon of the post-Second World War years and it has not occurred fortuitously. The outward migration to the suburbs of middle- and upper-income whites and the coresponding confinement of low-income minorities to the ghettos of central cities has, in large part, been the result of discriminatory policies by government and private industry.

The federal government—and particularly the Department of Housing and Urban Development and its predecessor agencies—through its own past discriminatory policies, bears a major responsibility for the racial and economic stratification that exists in the nation's metropolitan areas. HUD's sorry record has been documented by both public and private agencies including NCDH. *See* NCDH, *How the Federal Government Builds Ghettos* (1968); *see also* 4 United States Commission on Civil Rights, *Housing* (1961); United States Commission on Civil Rights, *Equal Opportunity in Suburbia* (1974). HUD's discriminatory administration of the low-rent public housing program, specifically the confinement of sites for public housing to areas of minority concentration, has been among the major factors contributing to this racial and economic stratification. It is precisely this discriminatory policy of HUD which the Court of Appeals below held unlawful.

The issue before this Court—whether the Court of Appeals properly remanded the case for consideration of an order for HUD to develop a plan to disperse low-income housing throughout the metropolitan area —is of the highest importance. The resolution of this

issue by the Court will bear significantly on the overall effort to assist low-income minorities in securing their legally protected right to equal housing opportunity, and to reverse the accelerating racial and economic polarization in metropolitan areas.

Finally, it should be stressed that the effect of HUD's unlawful conduct in confining low-income minorities to areas of minority concentration is not limited to the denial of equal housing opportunity, alone. Such discriminatory housing practices, among other results, "have deleteriously produced racial separation in the schools which in turn has had an adverse effect on the education of the children." 6 Presidential Documents 666, 667 (President's Message to Congress, May 21, 1970).

This Court's decision in *Milliken* v. *Bradley,* 418 U.S. 717 (1974), suggests the limits to which the public schools in a metropolitan area can be made to bear the burden of desegregation. "One vehicle can carry only a limited amount of luggage." *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22 (1971). Five years ago, the President of the United States called for an exploration of ways "of shifting to other public institutions a greater share of the task of undoing the effects of racial isolation." 6 Presidential Documents 424, 436 (President's Statement on Equal Opportunity in Education, March 24, 1970). This appeal presents the opportunity to develop, through Federal housing programs and agencies, the alternatives to massive busing as a means of affording equal educational opportunities to central city minorities.

QUESTION PRESENTED

Whether a federal court, in the exercise of its equity powers, may require a federal agency, which has practiced racial discrimination, to develop a remedial plan that extends beyond the geographic area of the proved violation.

SUMMARY OF ARGUMENT

I. There are significant factual differences between *Milliken* v. *Bradley* and this appeal. An examination of these differences demonstrates that *Milliken* does not preclude an order in this case requiring HUD to develop a metropolitan plan for relief. The key differences relate to the identity of the parties against whom the order would run, the kind of order that could provide effective relief, whether an order in this case can be fairly characterized as "inter-district", and the views of the parties affected by the order on the desirability of metropolitan-wide relief and their authority to carry it out.

II. A metropolitan plan for the location of low-income housing outside areas of existing minority and poverty concentrations would be consistent with statutory requirements mandated by Congress and endorsed by HUD in its own regulations. Over the years, Congress has demonstrated a progression in its thinking on national housing policy. More than 25 years ago, Congress established the national housing goal of "a decent home and a suitable living environment for every American family." 42 U.S.C. 1441. Since the Congress, through a series of legislative enactments, has provided substantive meaning to that goal. One such enactment is the Federal Fair Housing law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.*

which is aimed not only at eliminating housing discrimination, but also at achieving racial integration. Another such enactment is the Housing and Community Development Act of 1974, which seeks to reduce concentrations of lower-income families in central cities and facilitate access to suburban parts of metropolitan areas. HUD, through a series of regulations, has endorsed these twin policies of racial integration and dispersal of lower-income housing outside central cities.

III. The issue in the instant case does not involve the difficult administrative, fiscal, and practical problems of *Milliken*. The issue here is the far simpler one of equitable discretion. Under numerous federal court decisions, including those by this Court, an order requiring HUD to develop a metropolitan plan for relief would be a proper exercise of the equity power of federal courts. Such an order is well within the traditional equity power of the courts and the facts of this case make such an order eminently appropriate.

ARGUMENT

I. Because of the Significant Factual Differences Between Milliken v. Bradley and this Appeal, An Order Requiring HUD to Develop a Metropolitan Plan Is Not Precluded by the Milliken Decision.

In its brief, HUD rests its case almost entirely on this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974). HUD argues that the "inter-district" remedy rejected by this Court in that case applies with equal force to *Gautreaux*. NCDH contends that a careful analysis of *Milliken* discloses at least four significant factual differences between that case and the present appeal. These factors, taken together, demonstrate that the *Milliken* decision does not preclude a

federal court from ordering HUD to develop a metropolitan plan for relief.

The four key differences between the two cases are:

(1) The order in this case runs only against HUD, found to have been engaged in housing discrimination; in *Milliken*, the order ran not only against governmental bodies guilty of racial discrimination, but also against a large number of jurisdictions which had not practiced any racial discrimination.

(2) The order here would not act coercively against anyone other than HUD. In *Milliken*, innocent parties were directly affected by the order.

(3) The order here is not "inter-district" within the meaning of *Milliken*.

(4) The only party affected by the order—HUD—agrees that a city-only plan will not work. In *Milliken*, the affected parties strongly disapproved of a metropolitan plan.

Each of these distinctions will be examined in turn.

A. Parties affected by the order.

In *Milliken*, the order for relief would have applied not only to the state of Michigan and the Detroit school board, both of which had been found guilty of unlawful conduct, but also to more than 50 suburban school districts, not a single one of which had been found guilty of any wrongdoing. The issue presented to this Court in *Milliken* was whether a federal court could impose an order on these suburban school districts, in the absence of any finding of wrongdoing on their part.

By contrast, in the instant case, the only issue before this Court is whether the United States Department of

Housing and Urban Development, which has been found guilty of unlawful conduct, may be required to develop a metropolitan plan for relief. The judgment of the Court of Appeals below runs only against HUD.[1] Consequently, the order of the Court of Appeals, in remanding the case for further hearing, is to be evaluated only as it affects HUD.

Thus, in *Milliken,* the order considered by this Court was one that would have applied not only to parties found guilty of wrongdoing, but also to some 50 innocent governmental entities. In *Gautreaux,* the order to be considered by this Court applies only to HUD, whose wrongdoing has been established.

B. Nature of the Order.

In the instant case, as in *Milliken,* no specific metropolitan plan is before this Court for review. In *Milliken,* however, it was clear that the metropolitan remedy would require, in effect, consolidation of more than 50 independent school districts. It was also clear in *Milliken* that the order, in addition to causing substantial logistical, administrative, and fiscal problems to the various school systems, would also cause substantial problems to suburban and city residents alike, by assigning city and suburban school children to schools across district lines. Thus, in *Milliken,* although the precise nature of the ultimate order had not yet been determined, this Court was presented with a factual situation in which there was no question that the ultimate order would involve the coercive force of the federal courts, not only upon suburban school districts, but upon children and their families, with inevitable administrative, fiscal and practical problems.

[1] Neither the Chicago Housing Authority nor any of the recently joined housing agencies is a party to this appeal.

In the instant case, no such coercion upon innocent parties is involved and no similar problems flow from the ultimate order. The Court of Appeals below remanded the case to the District Court "for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in *Milliken* v. *Bradley.*" 503 F.2d at 940. As noted above, this judgment runs only against HUD and the sole issue before this Court is whether that federal agency, guilty of unlawful conduct, may be required by the Court to develop a metropolitan plan for relief. Thus, the contentions of the Government regarding the impact of a metropolitan plan on suburban jurisdictions are, at the least, premature, putting aside the question whether the United States has "standing" to raise those objections.

Equally important, it is likely that a HUD designed metropolitan plan will not involve a coercive order against any innocent parties, such as suburban public housing authorities, suburban municipalities, or individual families. This is true, in large part, because of the nature of the federal programs now available to HUD by which it can implement a plan for relief.

The Housing and Community Development Act of 1974, 88 Stat. 633, *et seq.,* effected substantial changes in the nature and operation of federal housing and urban development programs. Among the programs significantly changed under the 1974 Act is the low-rent public housing program which HUD administered in a discriminatory fashion in Chicago. The basic public housing law, the United States Housing Act of 1937,

42 U.S.C. 1401, *et seq.*, has been revised to include a new approach to public housing, embodied in "Section 8" of the revised public housing law. In fact, the Section 8 program is now the only public housing program in being.[2]

There are significant differences between the operation of the new Section 8 program and public housing under the earlier programs. Prior to the 1974 Act, federal law authorized two basic types of public housing: new construction ("conventional"), 42 U.S.C. 1401 *et seq.*, and leased housing ("Section 23"), 42 U.S.C. 1421b. Both kinds of public housing depended upon the participation and approval of local public housing agencies and local municipalities. If the local public housing agency did not apply for funds to HUD, public housing simply could not be built. And even if the local public housing agency did desire federal funds, the approval of the local municipality was still necessary before construction could begin, 42 U.S.C. 1415(7)(b), or before leased housing could become available. 42 U.S.C. 1421b(a)(2).

In contrast, under the new Section 8 program, HUD is authorized to provide low-income housing without the participation and approval of local agencies and municipalities. It may deal directly with the private housing and home finance industry; it is not required to work through local public housing agencies nor is approval by local minicipalities required.

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[2] The leased public housing program ("Section 23") has been replaced by Section 8 under the 1974 legislation. The new construction public housing program ("conventional"), while continued under the 1974 legislation, has been effectively terminated by HUD's administrative decision.

Under Section 8, HUD may perform the function of a local public housing agency and deal directly with owners of existing housing in areas where no local public housing agency has been organized or where the local agency is unable to implement the provisions of the program. 42 U.S.C. 1437f(b)(1). Further, HUD may deal either with local public housing agencies or directly with housing owners for construction of new Section 8 housing. 42 U.S.C. 1437f(b)(2). And local communities no longer have any veto power over the program. For the program to operate in any area, Section 8 generally requires only that there be a need for subsidized housing, a determination ultimately made by HUD.[3]

The differences between the old and new programs have enormous significance for this appeal. Under Section 8, Congress authorizes HUD to call upon the resources of the private housing industry to provide low-income housing, without regard to the participation of local public housing agencies and without the approval of local jurisdictions. Thus, Section 8 can be utilized to effectuate any metropolitan plan designed by HUD, and the federal court order would not have to require any local public housing agency nor any local municipality to take any special action.

Local public housing agencies, of course, could voluntarily participate in any plan devised by HUD. But in the event they did not, HUD is authorized under the new Act to deal directly with the private sector of the housing industry. And the function of local municipalities is the same function they perform regarding

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[3] See *infra* at 20.

non-subsidized housing. If a HUD contractor, for example, decided to build Section 8 housing in a particular community, he would make the usual application for a construction permit, complying with all local zoning regulations in the process. The Government's contention that this ordinary application of zoning laws, applicable to all housing, somehow constitutes special "control" over Section 8 housing is inaccurate, particularly when compared with the veto power exercised under the old public housing program.[4]

Because the operation of the new Section 8 program does not depend on the existence of a local public housing agency and its willingness to participate in the program, nor on the express consent of local jurisdictions, low-income families in Chicago will now have the opportunity to live outside the central city where the overwhelming majority of public housing units in the Chicago metropolitan area are now located and where the overwhelming majority of low-income minorities are now concentrated. It is important to stress that, unlike the situation in *Milliken,* where suburban and central city school children would have been *required* to attend schools across district lines, the ultimate order in the *Gautreaux* case would have no such coercive effect.

A plan for the location of public housing outside the City of Chicago in suburban parts of the metropolitan area would cause no disruption to families already liv-

[4] Needless to say, if the local community exercised its zoning powers in a racially discriminatory manner, it would be subject to challenge in the federal courts. *See United States* v. *City of Black Jack,* 508 F.2d 1179 (1974) *cert. denied* 95 S.Ct. 2656 (1975); *United Farmworkers* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974); *Kennedy Park Homes Ass'n* v. *City of Lackawanna,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971).

ing in these suburban jurisdictions. Needless to say, they would not be *required* to relocate into the central city, nor would their children be *required* under this plan to attend schools across district lines. The only change in their lives or in the environment in which they live would be that the central city minorities would have the opportunity to live among them. As for central city public housing residents, the effect of the plan would be to afford them—many for the first time—the opportunity to live outside areas of minority concentration. Central city residents as well would not be *required* to move to suburban areas, but would be given the opportunity to do so if they choose.

Thus, a key distinction between the issue before this Court in *Milliken* and in *Gautreaux* has to do with the element of coercion. Although in neither case was there a specific order for this Court to review, in *Milliken* it was clear that the order would involve the coercive force of the Court, brought to bear not only upon agencies found guilty of unlawful conduct, but also upon more than 50 school districts and, ultimately, upon school children and their families. In *Gautreaux,* the only party contesting the decision of the Court of Appeals below is HUD and HUD has been found guilty of unlawful conduct. A feasible and effective metropolitan plan for relief could be developed which would involve no coercion against any parties other than HUD, the acknowledged wrongdoer.

C. "Inter-District" Relief.

The Government has sought to characterize the issue before the Court as solely one involving "inter-district relief", thus bringing the case within the confines of *Milliken.* NCDH contends that the question presented

for review does not involve an "inter-district" remedy within the meaning of *Milliken.*

The term "district," whether "inter" or "intra", has no real meaning in the present circumstances where the single petitioner, HUD, which has metropolitan-wide jurisdiction, is challenging an order to develop a housing plan within this geographic area. In *Milliken,* which involved an order against some 50 separate and independent school districts, the Court accurately described the issue as one of "inter-district relief." In *Gautreaux,* by contrast, the question concerns an order only against HUD. No other parties—certainly not school districts—are involved. As discussed earlier, although no specific order has been entered in this case, the final judgment will not involve coercion of other parties, governmental or private.

Of special importance is an understanding of the key differences in the relevant geographical unit utilized in the separate and disparate fields of education and housing. In education, as this Court noted in *Milliken,* the relevant geographical unit is the school district. Decisions on school policy, including location of schools and school attendance, are made by individual school boards in those school districts. In housing, the relevant unit is not a "district," nor even an individual locality, but rather, as HUD concedes, the "housing market." And as HUD also concedes the "housing market" in this case is the metropolitan area.[5]

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[5] According to HUD: "For practical purposes, the Standard Metropolitan Statistical Area may be delineated as the housing market area in those cases where an SMSA has been established." Department of Housing and Urban Development, *Federal Housing Administration Techniques* 12-13 (Jan. 1970).

To be sure, housing markets—or metropolitan areas —are made up of a number of local jurisdictions. But these local jurisdictions do not ordinarily build housing, nor do they make the key decisions on the construction of housing. These decisions are made by builders and, in the case of federally assisted housing, by HUD as well.

Builders determine the location of housing on the basis of market analyses that show the existence of a market—a market that is not restricted by local jurisdictional lines. In the case of federally assisted housing, HUD is very closely involved, conducting its own market analyses to determine the feasibility and acceptability of the builders' proposals before providing necessary funding or mortgage insurance. The role of the localities is limited largely to assuring that whatever housing is built complies with local zoning laws and to providing necessary municipal facilities and services.

Builders and HUD, the main actors in the construction of housing, necessarily treat the metropolitan area as a single housing market. In short, for housing purposes, local boundaries carry little meaning. To the extent the term "district" has any meaning for purposes of the instant case—and NCDH contends it does not—it must embrace the Chicago metropolitan area.

Thus, in *Milliken* and in *Gautreaux* this Court, dealing with the different fields of education and housing, necessarily deals with two entirely different relevant geographical areas—in *Milliken,* the various independent school districts, of which there were some 85 in the Detroit metropolitan area; in *Gautreaux,* the sin-

gle "housing market" consisting of the entire metropolitan area. To characterize as "inter-district", the yet unknown order in the instant case to develop a metropolitan plan for relief is to distort a concept that carried special meaning in *Milliken* and arbitrarily seek to apply it to a totally different case where that concept is irrelevant.

D. A metropolitan plan for relief is both desirable and feasible.

HUD does not contest the desirability nor the need for locating public housing on a metropolitan-wide basis. As the Court of Appeals noted, all the parties concur in that judgment:

> While they disagree as to what relief the District Court should order, the parties are in agreement that the metropolitan area is a single relevant locality for low rent housing purposes and that a city-only remedy will not work. *Gautreaux* v. *CHA*, 503 F.2d at 937.

Nor is there any question that HUD has ample authority, power, and jurisdiction outside the City of Chicago, extending to the entire metropolitan area. HUD's objection is only to the *requirement* that it develop a metropolitan plan, not to its need or desirability, nor to its lack of authority. HUD supports and, indeed, advocates the aim of a plan which would locate public housing throughout the Chicago metropolitan area. It simply does not want to be ordered to develop such a plan, despite the fact that it has been found guilty of unlawful conduct and now is obliged to remedy the effects of its unlawful conduct.

This is in sharp contrast to the situation in *Milliken*. There, the defendants strongly objected to metropolitan

school desegregation as well as to their being required to develop a plan to achieve that end. Moreover, those more than 50 defendant school districts, unlike HUD, had not been found guilty of any wrongdoing.

II. Development of a Plan for the Location of Low-Income Housing Outside Areas of Existing Minority Concentration Throughout the Metropolitan Area Would Be Consistent With Statutory Requirements Mandated by Congress and Endorsed by HUD in Its Own Regulations.

The issue in this case is whether a federal court may order HUD, after finding HUD guilty of denying to low-income minorities the opportunity to live outside areas of minority concentration, to develop a metropolitan plan for relief. NCDH contends that to a large extent such an order would constitute nothing more that what is already mandated under various statutes enacted by Congress and under HUD's own regulations.

From the time of the first enactment of the federal public housing legislation in 1937, Congress recognized that the metropolitan area was the relevant geographical unit for public housing purposes and that the solution to the housing problems of the poor should not be sought solely within the confines of the inner-city. In the United States Housing Act of 1937, the first comprehensive federal legislation for the construction of public housing, Congress indicated its recognition that the metropolitan area was the relevant geographical unit by defining low-income families to include those "who cannot afford to pay enough to cause private enterprise in their locality *or metropolitan area* to build an adequate supply of decent, safe and sanitary dwellings for their use." 42 U.S.C. 1402(2) (emphasis added).

Several years later, in enacting legislation for the compulsory improvement or elimination of "unsafe or unsanitary dwelling units" comparable in number to newly built low-rent units, Congress allowed the improvement or demolition to occur in the "localities *or metropolitan area.*" 42 U.S.C. 1410(a) (emphasis added). The Senate Report emphasized the need to provide suburban housing opportunities for central city slum dwellers if those slums were to be eliminated.

> It is, of course, perfectly apparent that the elimination of residential slums in central city areas and their redevelopment in accord with a plan for the most appropriate use of the land therein (i.e., for public use, for industry, for housing at more appropriate density, etc.) makes necessary a dispersion of families now living in such slums. Federal loan assistance for the acquisition and preparation of open unplatted urban *or suburban land* to be developed for predominantly housing use, so that adequate provision can be made for the necessary dispersion of some portion of the central city population, is therefore essential to any effective slum clearance operation, and is entirely appropriate. S. Rep. No. 84, 2 *U.S. Code Cong. and Ad. News,* 1550, 1564 (1949) (emphasis added).

See also H.R. Rep. No. 590, 81st Cong., 1st Sess. 16 (1949). (Committee on Banking and Currency).

The public housing program, however, failed to produce the construction of low-income housing outside areas of racial concentration in central cities. Although Congress clearly contemplated the dispersal of such housing throughout the metropolitan area, the veto powers provided to local communities under the old

program had the effect of frustrating the achievement of this end.

In enacting the Housing and Community Development Act of 1974, Congress once again explicitly recognized the need to afford low-income families housing opportunities outside central cities. In its statement of "Findings and Purpose," Congress expressly referred to the problems stemming from "the concentration of persons of lower income in central cities. . . ." 42 U.S.C. 5301. Consistent with this important statement of "Findings and Purpose," Congress also declared that among the specific objectives of the legislation are "the reduction of the isolation of income groups within communities and geographical areas" and "the spatial deconcentration of housing opportunities for persons of lower income." *Ibid.*

In the new legislation which, as noted earlier, significantly changes the nature and operation of federal housing and urban development programs, Congress shaped the substantive programs so as to facilitate housing opportunities for lower-income families outside central city areas where these families have traditionally been confined. First, among the conditions of eligibility for community development block grants under Title I of the Act, a municipality must submit a "housing assistance plan" which, among other things, provides for the housing assistance needs of lower-income persons "residing in *or expected to reside* in the community" (emphasis added). It mandates that site selection for low-income housing be undertaken with the objective of "avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons. . . ." 42 U.S.C. 5304(a)(4).

Second, in establishing Section 8 as the principal federal program to provide housing for the poor, Congress eliminated the provisions governing previous public housing programs that permitted individual localities to prevent the construction of public housing within their borders. Localities that have submitted applications for community development block grants may object to the construction of Section 8 housing *only* on grounds that the housing is inconsistent with the locality's housing assistance plan. 42 U.S.C. 1439 (a)(2). Even so, if HUD disagrees, the housing will be built despite the locality's objections. *Ibid.*

Third, contrary to the Government's contention, localities that decide to do without community development funds for fear that lower-income minorities will move in as a result of the required housing assistance plan cannot, by this means, exclude Section 8 housing and the lower-income minorities who would reside in it. Under the Act, HUD may approve applications for Section 8 housing in such localities if the Department determines that there is a need and there are or will be adequate public facilities and services. 42 U.S.C. 1439(c).

Thus, Congress, through its legislative enactments, has demonstrated a progression in its thinking on housing policy and programs, particularly as they relate to the needs of the poor. Congress has acknowledged that mere recognition of the need to deal with the problem of the "concentration of persons of lower income in central cities" is not sufficient. It now has also established mechanisms to locate that housing outside those areas. The new Act, by requiring localities that desire federal assistance in the form of community development block grants to deal also with the

housing needs of lower-income families—not only those already residing there, but also those "expected to reside" in the community, seeks to facilitate access of lower-income central city residents to suburban parts of the metropolitan area. To aid in securing such access, Congress has established a new public housing program, Section 8, which can operate freely throughout metropolitan areas without the veto power suburban jurisdictions exercised over previous programs.

Congress has matched its concern over the need to eliminate the isolation of low-income families with a similar concern over the need to eliminate racial isolation as well. In 1964, Congress passed Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibiting discrimination in federally assisted programs, including public housing. In 1968, Congress enacted the federal fair housing law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* The stated policy of Title VIII is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. There is a depth of meaning to the term "fair housing." To be sure, it is concerned with eliminating housing discrimination. But as this Court noted in quoting approvingly from the legislative history of Title VIII, in its decision in *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1973), the reach of the federal fair housing law also is "to replace the ghettos 'by truly integrated and balanced living patterns.'" Moreover, Congress has expressly directed the Secretary of HUD to "administer the programs and activities relating to housing and urban development in a manner *affirmatively* to further the policies of [Title VIII)]." 42 U.S.C. 3608(d)(5)

(emphasis added). See *Shannon* v. *HUD,* 436 F.2d 809 (3rd Cir. 1970).

For more than 25 years, Congress has consistently maintained as the cornerstone of our national housing policy the goal of "a decent home and a suitable living environment for every American family." 42 U.S.C. 1441a. Over the years, Congress has embodied this goal with substantive meaning, both quantitative and qualitative.

In 1968, Congress quantified the goal by calling for the construction, within the next decade, of 26 million housing units, six million of which would be for lower-income families. *Ibid.* Congress has also recognized, however, that the goal cannot be achieved solely by means of increased housing production and that for the poor, particularly the minority poor, it cannot be achieved through their continued confinement to central city areas of minority and poverty concentration. Thus, the fair housing law seeks "to replace the ghettos 'by truly integrated and balanced living patterns.' " The economic equivalent of this policy of racial integration is contained in the Housing and Community Development Act of 1974, legislation aimed at reducing concentrations of lower-income families in central cities and facilitating access to suburban parts of metropolitan areas.

HUD, the agency charged with responsibility for administering and enforcing both the federal fair housing law and the Housing and Community Development Act of 1974, has, through a series of administrative regulations, endorsed this metropolitan approach to the housing needs of minorities and the poor. Also, through administrative regulations, HUD

has established policies to facilitate access by minorities and the poor to suburban housing and to avoid areas of minority and poverty concentration.

Thus, in its "Affirmative Fair Housing Marketing Regulations," HUD requires that developers of subsidized and unsubsidized federally assisted housing formulate marketing programs that respond to the racial and ethnic population characteristics of the housing market area, not individual municipalities. 24 C.F.R. 200.610. Specifically, HUD requires that assisted builders of housing in white, suburban areas adopt marketing techniques to attract minorities. Department of Housing and Urban Development, HUD Circular 8030.3, revised, App. 2 at 3 (June 1973).[6]

In its "Project Selection Criteria," HUD establishes priorities for funding applications for federally subsidized housing. The criteria operate within the metropolitan area, without regard to the boundaries of individual local jurisdictions. Among the standards specified by HUD is that the housing must result in "Improved location for low(er) income families," the first objective being "to avoid concentrating subsidized housing in any one section of a metropolitan area or town." 24 C.F.R. 200.700. Another standard is "Minority Housing Opportunities," an objective being "To open up nonsegregated housing opportunities that will will contribute to decreasing the effects of past housing discrimination." *Ibid.* The highest priority is accorded to a proposed project located "so that, within the housing market area, it will provide opportunities for minorities for housing outside existing areas of mi-

[6] HUD's nondiscrimination requirements for community development block grants extend to communities not guilty of prior discrimination. 24 C.F.R. 570.601(e)(4)(ii).

nority concentration and outside areas which are already substantially racially mixed." *Ibid.*

Parallel to its implementation of the Fair Housing laws, HUD's regulations governing the new Section 8 program require:

> The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons. 24 C.F.R. 883.209(a)(3).

The Congressional purpose to reduce the isolation of low-income families is reflected in HUD's regulations governing community development block grants as well. HUD requires that the requisite housing assistance plans must take into account the needs of lower-income persons already residing in the community "or planning or expected to reside in the community as a result of planned or existing employment facilities." 24 C.F.R. 570.303(c)(2).

Thus, HUD regulations consistently treat the housing market as the relevant geographical area in determining how federal programs will operate. Further, these regulations, in combination, reflect a policy aimed at reducing isolation of minorities and the poor and opening up housing opportunities for these families outside central city areas where they previously were confined, throughout the housing market, or metropolitan, area.

NCDH contends that the issue raised by the decision of the Court of Appeals below—whether a federal court may consider an order requiring HUD to develop a metropolitan plan for relief—has, in part, already been resolved by Congress and by HUD itself. The conclu-

sion that "this nation is committed to a policy of balanced and dispersed public housing," *Crow* v. *Brown,* 332 F.Supp. 382, 390 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972), accurately reflects national housing policy as expressed by statute and HUD regulation. By the same token, the combination of housing and civil rights laws, and HUD regulations implementing those laws, provide full support for HUD to administer its programs in the Chicago area on a metropolitan-wide basis. When these statutory and regulatory mandates are considered in light of HUD's racially discriminatory public housing practices in Chicago, the judgment of the Court of Appeals, calling upon HUD to design a plan to disperse low-income housing on a metropolitan basis, becomes eminently appropriate.

III. An Order Requiring HUD to Develop a Metropolitan Plan for Relief Would Be Within the Equity Power of Federal Courts, as Approved by This Court and Lower Federal Courts.

As discussed earlier, in *Milliken,* this Court was presented with the question whether a federal court could order some 50 independent government agencies to undertake affirmative action to correct the effects of past discrimination for which (according to the record) they bore no responsibility. The Court ruled that, absent a showing of an "inter-district" violation or wrongdoing on the part of the government agencies, such an order was beyond the equity power of the Federal courts.

The instant case does not involve the difficult administrative, fiscal, and practical problems of *Milliken,* nor the thorny problems involved in subjecting innocent parties to an order by the federal court. The question before the Court in this case is far easier. It is simply whether a federal court, in the exercise of its equity

powers, may require a federal agency, which has practiced racial discrimination in the location of public housing, to develop a remedial plan that extends beyond the geographic area of the proved violation. The issue is one of equitable discretion. After all, although HUD's illegal practices occurred within the City of Chicago, its authority, power, and jurisdiction in the housing market area of which Chicago is a part, extend to the entire metropolitan area.

Thus, Milliken is relevant to the present appeal only to the extent that it sets the parameters for "the appropriate exercise of federal equity jurisdiction." *Milliken* v. *Bradley,* 418 U.S. 717, 753 (Stewart, J. concurring). The difficult problems which the Court in *Milliken* perceived as barring a remedy that went beyond the Detroit city limits are simply not present here.

The Government's opposition to a metropolitan plan rests largely on "the long-standing equitable principle that the relief ordered should be no broader than the violation found." That contention demonstrates a fundamental misunderstanding of the scope of the equitable jurisdiction of the federal courts. As this Court has stressed: "In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices." *International Salt Co.* v. *United States,* 332 U.S. 392, 401 (1947). This Court has long recognized that, in litigation seeking injunctions in public interest cases, "relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.,* 340 U.S. 76, 90 (1950).

> [T]he court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. *Porter* v. *Warner Holding Co.,* 328 U.S. 395, 398 (1946).

These principles have particular application in actions, as here, which concern the public, not merely disputes between private individuals. "And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Ibid.* Cases in which racial discrimination has been found clearly call for a very expansive application of the injunctive authority of the federal courts. As this Court emphasized in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 15:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexbility are inherent in equitable remedies.

See also Louisiana v. *United States,* 380 U.S. 145 (1965); *Brown* v. *Board of Education,* 349 U.S. 294 (1955).

The precedents not only provide general authority to support the judgment of the Court of Appeals but also are important for the specific remedies they sustained. *United States* v. *United States Gypsum Company, supra,* has particular significance for the case at bar. In *Gypsum,* the United States sued to enjoin a combination and conspiracy in restraint of trade in gypsum products. The Government's complaint and proof were limited to the defendants' activities in the eastern territory of the United States. The United States argued that, in order to make the relief effective

and to correct the effects of the prior illegality, the decree must extend to defendants' business operations throughout the United States, not merely to those in the eastern territory. This Court reversed the lower court's rejection of that remedy, recognizing "that relief, to be effective, must go beyond the narrow limits of the proven violation." *Id.* at 90.

The *Gypsum* case is indistinguishable from the present appeal. There, as here, the proved violation occurred in a limited geographic area. There, as here, the defendants' activities extended beyond the area of the violation. In *Gypsum,* as in this case, the defendant argued that relief must be restricted to the area of the violation. There, as here, relief could only be effective if it extended outside the geographic boundaries of the proved illegality. If anything, the decree in the instant case, where relief would extend only through the housing market area, would be less severe than in *Gypsum,* where the decree extended nationwide.

The principle that an equitable decree may be applied to a defendant's operations outside the geographic area of the demonstrated unlawful conduct has been applied by the lower federal courts. In *Brennan* v. *J. M. Field Inc.,* 488 F.2d 443 (5th Cir. 1973), *cert. denied,* 419 U.S. 881 (1974), for example, the Secretary of Labor sued to enjoin sex discrimination against women under the Equal Pay Act. The proof showed that the defendant had violated the Act with respect to supervisory employees at three stores in one state. The Court of Appeals affirmed an order enjoining the defendant from engaging in discriminatory practices at more than 60 stores in 11 states. *See also Beneficial Finance Company of Wisconsin* v.

Wirtz, 346 F.2d 340 (7th Cir. 1965). In *Brennan,* as in this case, the proof showed illegal practices by the defendant in a limited part of its business, but the decree extended to other operations outside that confined geographic area, in fact, to other states. *See J. P. Stevens & Co.* v. *NLRB,* 380 F.2d 292 (2d Cir. 1967), *cert. denied,* 389 U.S. 1005 (1967) (Court of Appeals approved an NLRB order which required the posting of remedial notices in 43 plants even though the evidence showed a violation at only 20 plants.)

In numerous other decisions, this Court and lower federal courts have approved decrees that extend beyond the area of the proved violation. Those cases are not limited to geographic considerations. They cover a wide range of defendants' activities not shown to be unlawful. In *International Salt Co.* v. *United States, supra,* this Court, in an antitrust case, approved a remedial provision which enjoined the defendant from discriminating against applicants seeking to lease its machines. Although there was no proof that such discrimination had in fact occurred, this Court deemed it an appropriate form of relief to close the "untraveled roads" to illegal conduct. It expressly rejected the defendants' contention, asserted by HUD in this case, "that the injunction should go no farther than the violation or threat of violation." *Id.* at 400.

Similarly, in *Louisiana* v. *United States, supra,* a case involving racial discrimination in voting, this Court affirmed a lower court decree enjoining the use of a new voter qualification test which had not been shown to be unlawful.

> We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory

effects of the past as well as bar like discrimination in the future. *Id.* at 154.

See also United States v. *Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966), *aff'd en banc* 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied,* 389 U.S. 840 (1967) (Court of Appeals affirmed school desegregation order which, *inter alia,* included provisions relating to the construction of new schools even though there was no proof of discriminatory site selection); *Hodgson* v. *First Federal Savings and Loan Association of Broward County,* 455 F.2d 818 (5th Cir. 1972) (Court of Appeals reversed a district court order which limited injunction in age discrimination in employment cases to classification where illegality proved); *United States* v. *Ward,* 349 F.2d 795 (5th Cir. 1965) (Court of Appeals authorized expansion of injunction to protect potential as well as actual victims of voting discrimination); *Adams* v. *Richardson,* 356 F. Supp. 92 (D. D.C.), *aff'd* 480 F.2d 1159 (D.C. Cir. 1973) (Court ordered Department of Health, Education and Welfare, *inter alia,* to institute a civil rights enforcement program respecting public vocational and other special schools in at least 17 states based on evidence of non-compliance in one state).

Against this background, it is clear that a federal court may order HUD to devise a remedial plan which extends beyond the geographic area of the proved violation. It remains only to show the appropriateness of that decree in this case. NCDH believes such a judgment may rest independently on any of the following grounds.

First, it must be kept prominently in mind that here beneficiaries (the plaintiffs) are low-income black persons who are victims of HUD's discriminatory

practices. They have been denied the opportunity to live in public housing located outside areas of racial concentration. Because of the housing discrimination practiced by HUD, these minority persons were and are confined to housing built in minority neighborhoods.

Because HUD actively participated in a program which excluded low-income black persons from white residential areas, it is appropriate now to require HUD to provide housing opportunities outside racially impacted areas. HUD apparently does not disagree with that contention. Nor does HUD contest the desirability of providing such opportunities outside the City of Chicago. HUD merely asserts that, to the extent it is *ordered* to locate new units outside areas of minority concentration, the order should be limited to the City of Chicago.

NCDH contends that such a limitation would not provide low-income minorities the fullest opportunity to reside outside areas of minority concentration, and the denial of this opportunity is the basic wrong that HUD has done to them. It is undisputed that the overwhelming majority of low-income minorities in the Chicago metropolitan area reside in the City of Chicago. It is also undisputed that the overwhelming majority of low-rent housing in the metropolitan area is similarly located within the City of Chicago. Thus, an order against HUD limited to the City alone would mean continued location of low-income housing in the one part of the Chicago metropolitan area in which such housing and the low-income minorities who occupy it are already confined.

By contrast, an order requiring HUD to utilize the entire Chicago metropolitan area—the relevant hous-

ing market area—in determining where low-income housing should be located would afford substantially greater opportunities for securing effective relief. In short, if the order for relief is to overcome the effects of HUD's past discriminatory practices, current housing and demographic patterns dictate that HUD be required fully to utilize the entire housing market area, the relevant geographic unit for HUD programs. "It would be unsound thus to limit the geographic scope of this particular decree." *Wirtz* v. *Ocala Gas Co.*, 336 F.2d 236, 240 (5th Cir. 1964).

Second, while the first point rests on current housing and demographic patterns in the Chicago area, it is also proper for Federal equity courts to take into account what the future holds in store. The record shows that as early as 1984, less than ten years hence, Chicago will become a majority black city. If HUD is permitted to develop a remedial plan confined to the City alone, it will become an active participant in hastening the arrival of that day, thus compounding the problems stemming in part from its unlawful conduct. In devising an appropriate remedy, Federal equity courts must take into account "facts which radiate a potential for future harm." *Times-Picayune Pub. Co.* v. *U.S.*, 345 U.S. 594, 622 (1953). That is precisely what the Court of Appeals did in this case in ordering consideration of metropolitan relief.

Third, it must be recalled that the efforts of the plaintiffs and the lower courts to obtain an effective remedy have been repeatedly frustrated. The Court of Appeals refused to "burden [its] opinion with the details of the eight-year delay that has thus far deprived the appellants of the fruits of the District Court's judgment entered on July 1, 1969." 503 F.2d

at 932. In its original order, for example, the District Court required the Chicago Housing Authority (CHA) to seek the voluntary cooperation of suburban officials to construct housing outside the City. No one objected to that order. Indeed, as the Court of Appeals noted, all the parties in this case agree "that a city-only remedy will not work." 503 F.2d at 937. The CHA, however, was unable to obtain any cooperation from suburban officials. No low-income housing units were built pursuant to that provision of the District Court's order. Now, several years later, it is clear that local officials, acting alone, cannot produce the housing needed to remedy the violation. But HUD, utilizing its metropolitan-wide jurisdiction and calling on the resources of the private housing industry under the new Section 8 program, can.

In this context, its is appropriate that HUD, which to date has played a passive role in the remedial aspects of the case, now be required to adopt a more positive and affirmative approach to remedy the severe deprivations which it, together with state officials, visited on the plaintiffs. HUD is the only defendant in the case which has the authority to locate housing throughout the metropolitan area.

Fourth, NCDH also stresses the sound practical reasons why the order for relief should extend beyond the central city to the entire housing market area. Housing does not exist in a vacuum, but is closely related to achieving equal opportunity in other areas, particularly employment and education.

The harsh reality of modern-day life is that increasingly, centers of employment are being located in suburban and outlying parts of metropolitan areas,

not in central cities. Thus, the City of Chicago, during the decade 1954-63, lost more than 150,000 jobs, while other parts of the metropolitan area gained more than 200,000. United States Commission on Civil Rights, *Federal Installations and Equal Housing Opportunity* 3 (1970). These jobs, many of which could be filled by relatively unskilled persons, are virtually inaccessible to the central city, where low-income minorities are overwhelmingly confined. *Id.* at 4. As the U.S. Commission on Civil Rights pointed out:

> The surest access to suburban job centers is through provision of housing at or near these locations at prices lower-income employees can afford. *Id.* at 5.

In education, this Court, as well as numerous lower federal courts, has been struggling with the problem of school segregation on a metropolitan scale. The order for metropolitan relief which this Court rejected in *Milliken* v. *Bradley, supra,* was an effort to overcome the formidable obstacles to school desegregation caused, at least in part, by the phenomenon of housing segregation between city and suburbs. As with employment, the surest and least cumbersome way to effect school desegregation in the various school districts that exist in metropolitan areas is to provide housing opportunities, particularly for lower-income minorities, throughout the metropolitan area.

This case involves the denial of equal housing opportunity, and the relief ordered by the Court of Appeals must be evaluated in terms of its appropriateness and effectiveness in righting that wrong. NCDH urges, however, that an order limited to the City of Chicago alone, will not only be ineffective in remedying the effects of the specific violation in this case, but

is also likely to perpetuate other inequalities for the indefinite future.

NCDH strongly disagrees with HUD's invocation of the "parade of horrors" argument, which is set forth at page 37 of its brief:

> Moreover, the construction of new public housing will inevitably entail expansion of many municipal services—not only the sewers, watermains, and electricity lines directly required by the housing units, but also streets, schools, and transportation facilities, as well as the police, fire, health and similar services required by the new residents. Thus, in supervising the development and implementation of a new metropolitan area-wide housing plan, the court will have to concern itself with the need to provide a whole range of municipal services in order to make the construction and occupation of the public housing units feasible.

Of course, it must be remembered that no plan has yet been devised. Therefore, there is no way of knowing what, if any, expansion of services will be needed and how much they will cost. On remand, the Court of Appeals fully contemplates a further evidentiary hearing so that the parties will have the opportunity to examine these concerns at closer range and in the context of a specific plan which calls for dispersing housing throughout the metropolitan area.[7]

Moreover, the fact of the matter is that a well-planned program of dispersing public housing throughout the metropolitan area will not require the kind of

---

[7] Even if some expense by local communities is involved, HUD is not the proper party to raise the objection. If, when a plan is proposed, local governmental bodies believe it will entail undue expenditures, they will have ample opportunity to present their evidence.

expenditures HUD envisions. The low-income blacks who presently reside in Chicago must live somewhere. It is axiomatic that municipal services need to be provided for them wherever they reside. How can it be, therefore, that the movement of low-income blacks from the City to the suburbs will require a significant increase in the total money appropriated for such services? Ever since the suburbia movement began, suburban municipalities have been confronted with the problem of expanding services to meet new needs. Placing low-income housing in the suburbs must, of course, conform to local zoning regulations, including density provisions. Thus, whether housing on a particular site is constructed for low- or moderate- or upper-income persons, the municipal facilities needed to support that increased population would appear to be the same. But again there is no way of calculating now what, if any, costs would have to be borne by municipal governments under a HUD metropolitan plan. HUD's contention is at best speculative and premature.

CONCLUSION

For the foregoing reasons, NCDH respectfully urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1975

No. 74-1047

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v.

DOROTHY GAUTREAUX, ET. AL., *Respondents*

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

CONSENT OF THE PARTIES 5

QUESTIONS PRESENTED 5

SUMMARY OF ARGUMENT 7

ARGUMENT 7

I. A METROPOLITAN REMEDY AS TO HUD IS NOT PRECLUDED BY *Milliken* SINCE SUBURBAN HOUSING AUTHORITIES ARE NOT MANDATED TO TAKE ANY ACTION AND HUD'S AREA OF OPERATIONS IS UNRELATED TO DISTRICT LINES 7

A. HUD is Authorized to Contract with Private Developers and Non-Profit Organizations to Provide Low-Cost Housing Opportunities and Need Not Rely Upon Local Housing Authorities 9

B. In Accordance with a Congressional Policy to Deconcentrate Low Cost Housing Throughout Metropolitan Areas, HUD's Primary Focus for the Administration of its Housing Programs is the Overall Housing Market Area, Rather Than Limited Geographical Political Entities 14

1. The Housing and Community Development Act of 1974 seeks to deconcentrate low-cost housing programs throughout metropolitan areas 15

2. Other laws and regulations further the policy of metropolitan residential desegregation 18

Page

3. Current Congressional policies of deconcentrating low cost housing are responsive to past racial discrimination and its damaging consequences 24

C. The Lower Court was Obligated to Fashion a Remedy Which Would Effectuate Underlying Congressional Policies and Goals to the Fullest Possible Extent 27

II. The Decision Below Requiring a Metropolitan Remedy To Resolve the Housing Problems of Lower Income Citizens Neither Presents Major Practical Problems, Nor Conflicts With Well Established Traditions Which Dictate Against Such Relief 31

A. The Lower Court Correctly Concluded That Metropolitan Housing Desegregation Did Not Pose Practical Problems or Conflict With Tradition As Was the Case In *Milliken* 31

B. The Decision Below Is In Accord With The Dictates of Sound Urban Planning 33

C. Metropolitan Approaches Are Essential to This Country's Welfare 37

Conclusion 39

INDEX OF CITATIONS

Cases:

Albemarle Paper Co. v. *Moody*, —— U.S. ——, 45 L.Ed.2d 280 (1975) 29

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Page

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Page

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STATUTES:

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Section 601, 42 U.S.C. § 2000d 19
Section 602, 42 U.S.C. § 2000d-1 30

Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3301 *et seq.* 23

Equal Education Opportunities Act of 1974..... 29

Fair Housing Law of 1968, 42 U.S.C. § 3601 *et seq.*...6, 18, 28, 29
Section 808, 42 U.S.C. § 3608(d)(5) 18

Housing Act of 1954, Section 701, 68 Stat. 640 21

Housing Act of 1959
Section 701(a), 73 Stat. 678 21
Section 701(c), 73 Stat. 679 21

Housing and Community Development Act of 1974, 42 U.S.C. § 5301 *et seq.* 6, 9, 15, 28
Section 101, 42 U.S.C. § 5301(a) 15
Section 101, 42 U.S.C. § 5301(c) 15
Section 104, 42 U.S.C. § 5304(a)(1) 16
Section 104, 42 U.S.C. § 5304(a)(4)(C) 13, 16
Section 104, 42 U.S.C. § 5304(b)(3) 16
Section 104(a)(4), 42 U.S.C. § 5304 12
Section 109, 42 U.S.C. § 5309 19
Section 213, 42 U.S.C. § 1439(a) 12
Section 401, 40 U.S.C. § 461 21

Page

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Housing and Urban Development Act of 1968 22
40 U.S.C. § 461(a) 21, 22
Section 235, 12 U.S.C. § 1715z 10
Section 236, 12 U.S.C. § 1715z-1 10

Intergovernmental Cooperation Act of 1968, 42 U.S.C. § 4231 *et seq.* 23

HUD Regulations
24 C.F.R. § 200.620(a) 20
24 C.F.R. § 200.700 19
24 C.F.R. § 570.303(c) 13, 17
24 C.F.R. § 570.303(c)(2) 17
24 C.F.R. § 570.303(c)(4)(ii) 17
24 C.F.R. § 570.601(4)(ii) 18
37 Fed. Reg. 203 (1972) 20

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Section 8, 42 U.S.C. § 1437f 10
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Page

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Page

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INTEREST OF AMICI

Amici pursue programs to insure equal opportunity to all Americans. They are deeply concerned with the rapid growth of residential segregation, particularly between cities and suburbs, which threatens to divide this country into two warring camps.

The University of Notre Dame Center for Civil Rights was established in 1973 to continue in the private sector the commitment toward achieving equality which the Reverend Theodore M. Hesburgh, C.S.C., President of the University, pursued for fifteen years as a member and then Chairman of the United States Commission on Civil Rights. The Center for Civil Rights is a resource for research into the United States' recent civil rights history; it engages in analysis of current civil rights issues, and it attempts to recommend viable solutions to civil rights problems. The Center is intimately familiar with the history and current extent of housing discrimination in this country and the legal and moral issues involved in eradicating this blight. The Center, moreover, believes that this case contains the most important and controversial issue in the area of public housing, e.g. the selection of sites for that housing. The following members of the Advisory Council of the Center for Civil Rights join in support of this brief: Reverend Theodore M. Hesburgh, Chairman; Berl I. Bernhard, partner in law firms in Washington, D.C., and New York and former Staff Director of the U.S. Commission on Civil Rights; Marian Wright Edelman, Director of the Children's Defense Fund; Oscar Garcia-Rivera, Editor, Juvenile Justice Standards Project and Chairman of Aspira of New York, Inc.; Earl G. Graves, Earl G. Graves Publishing Company; M. Carl Holman, President, National Urban Coalition; Kenneth Keniston, Professor, Yale University; Burke Marshall, Deputy Dean, Yale Law School; William May, Chairman of the Board, American Can Company; Grace Olivarez, Commissioner, State Planning Commission of New Mexico; Harrison Salisbury, author and retired member of the edi-

torial staff of the *New York Times;* William L. Taylor, Director, Center for National Policy Review and former Staff Director of the U.S. Commission on Civil Rights; Professor Lester C. Thurow, Massachusetts Institute of Technology; Harris Wofford, President, Bryn Mawr College; and Howard A. Glickstein, Director of the Center and former General Counsel and Staff Director of the U.S. Commission on Civil Rights.

Since its inception in 1970, the Center for National Policy Review has furnished support for various civil rights and other public interest organizations in their struggle to implement Federal laws designed to protect the rights and interests of racial minorities. As a public interest law center located at the Catholic University of America Law School in Washington, D. C., the Center has provided research and other technical assistance as well as legal representation in rule making or other Federal agency proceedings. The Center is committed to devising policies of affirmative action to undo the effects of past discriminations under Federal programs. Recently, the Center has been deeply involved with studying the legislative history and effect of Federal housing legislation such as the 1974 Housing and Community Development Act.

The League of Women Voters in the United States was incorporated under the laws of the District of Columbia in 1920 and has since that time promoted political responsibility through informed and active participation of citizens in government. At present it has a membership of 140,000. The League has undertaken numerous studies on issues of public interest and has taken action as a result of these studies, including appearances in judicial proceedings involving important public issues. Among the subjects to which the nation-

al, state, and local Leagues have devoted extensive study are the impact of inequality of opportunity in employment, education, and housing in the United States. The League has concluded that residential segregation is one of the primary causes of lack of opportunity in the critical areas of employment and education. The League of Women Voters of Illinois is an affiliate of the National League with approximately 9,000 citizens of Illinois in 81 local chapters. The Cook County League, because of its county-wide membership base, is acutely conscious of the metropolitan nature of the problem of low-income housing, and is concerned with the increasing trend toward a poor black inner city surrounded by a range of white, middle-class suburbs. The League of Women Voters of Chicago has studied the relationship between residential segregation and segregation in education, and has concluded that it is of the utmost importance that the pattern of residential segregation which has up to now been protected, promoted, and furthered by the government of the City of Chicago and the Chicago Housing Authority with the knowing cooperation of the United States Department of Housing and Urban Development be broken if the City is to survive as a socially and economically viable entity.

Suburban Action Institute is a non-profit agency established in 1969 for the purpose of promoting an equitable urban growth policy for America. It is particularly concerned with eliminating discriminatory barriers established by laws which have the effect of excluding racial and economic minorities from finding housing and jobs within suburban communities. Through a comprehensive program of research, education, organization and litigation, it seeks to overturn

existing discriminatory housing and land use practices and to replace them with inclusionary development policies. The Institute is located in New York City and has served as a consultant to federal, state and local governments. Its Board of Trustees is comprised of public officials and private individuals concerned with finding means for having the nation's growing suburbs share with the cities in overcoming poverty and discrimination.

CONSENT OF THE PARTIES

Carla A. Hills and Dorothy Gautreaux et. al., by their attorneys, have consented to the filing of this brief. Their letters of consent are on file with the Clerk of this Court.

QUESTIONS PRESENTED

1. Having found that the Department of Housing and Urban Development had engaged in "unconstitutional site selection and tenant assignment procedures" and that the "extra-city impact" of HUD's discrimination "appears to be profound and far-reaching," did the Court of Appeals err in ordering the district court to consider requiring metropolitan area relief as to HUD?

2. Does a metropolitan remedy as to HUD present such practical problems as to necessitate more limited equitable relief?

SUMMARY OF ARGUMENT

I

We believe that the directive of the court below that metropolitan-wide relief be fashioned to correct the racially discriminatory actions of the petitioner HUD

does not raise issues of interdistrict remedy of the kind considered by this Court in *Milliken* v. *Bradley,* 418 U.S. 717 (1974). The remedy ordered by the Court of Appeals applies only to HUD—a federal agency whose activities are not restricted to particular jurisdictions —and in no way mandates any action by any of the suburban Chicago housing authorities. HUD has clear statutory authority to promote the construction of low-income subsidized housing throughout the metropolitan area without involvement of local housing authorities.

HUD, moreover, traditionally operates on a metropolitan-wide or a housing market area basis in structuring its programs and activities and as a result the appropriate district for purposes of developing a remedy in this matter is the metropolitan area and not the political confines of the City of Chicago.

In addition, *amici* contend that this case differs from *Milliken* because the lower court here was obligated to exercise its equitable powers to the greatest extent possible to accomplish the strong underlying Congressional policy that federal housing programs be structured to deconcentrate low-cost subsidized developments throughout a metropolitan area so as to eliminate racial and economic segregation. This policy emerges clearly from legislative findings and directives contained in the Housing and Community Development Act of 1974, the Fair Housing Law of 1968, and the Civil Rights Act of 1964. In *Milliken,* the Court dealt only with the issue of appropriate equitable relief in light of a finding of denial of equal protection of the laws in the administration of Detroit's public school system and no overriding Congressional policy was in issue.

II

Practical considerations and the deeply rooted tradition of local control of the operation of schools militated against an interdistrict remedy in *Milliken.* These concerns are not present when dealing with the administration of federal housing policies. The decision below deserves additional support for historical, sociological, and planning considerations, all dictating that metropolitan responses to resolving our nation's housing problems are essential. The decision does not raise the problems or contravene traditions of the type this Court responded to in *Milliken.*

The *amici* support, but do not develop in this brief, the respondent's position that there is sufficient evidence in the record pointing to purposeful segregation in public housing programs outside Chicago, thereby warranting a presumption of racial discrimination by suburban local housing authorities. See, *Keyes* v. *School District No. 1, Denver, Colo.,* 413 U.S. 189 (1973). Thus, even under the petitioner's view of the applicability of *Milliken,* the lower court was justified in directing a metropolitan remedy as to HUD which has financed and supported all of the public housing construction throughout the Chicago region.

ARGUMENT

I

A METROPOLITAN REMEDY AS TO HUD IS NOT PRECLUDED BY *MILLIKEN* SINCE SUBURBAN HOUSING AUTHORITIES ARE NOT MANDATED TO TAKE ANY ACTION AND HUD'S AREA OF OPERATIONS IS UNRELATED TO DISTRICT LINES.

In seeking to convince this Court that the present case is controlled by *Milliken* v. *Bradley,* petitioner must account for the fact that the remedy here, unlike

that in *Milliken,* runs only against a federal agency, not any state or local unit. Its effort to deal with this uncomfortable fact rests entirely on a claim that Federal housing programs are virtually universally implemented "through cooperation with local housing authorities, since [HUD] has no legal power to coerce them to participate in any coordinated metropolitan area-wide plan." (Pet's Br., pp. 15-16 n.14). An order involving a metropolitan area remedy, petitioner claims, necessarily compels HUD somehow to coerce suburban housing authorities, who HUD argues have not been found to have engaged in discriminatory actions, to undertake new integrated low-cost housing developments. According to the petitioner, this is no different from *Milliken* where the state implemented its school programs through local school districts and where this Court held that an interdistrict desegregation remedy was inappropriate, not only to the individual districts, but to the state as well. The petitioner thus seeks to posit a situation where local suburban housing authorities constitute critical elements in any metropolitan relief ordered against HUD, thereby making a conflict with the *Milliken* decision unavoidable.

But the petitioner has misstated both the nature of the relief ordered by the Court of Appeals and the role played by local housing authorities in HUD programs. At the outset, it is important to stress that in this case it is uncontroverted that HUD is a principal wrongdoer and the challenged order is directed only to that agency. The housing authorities outside Chicago have not been subjected to any court mandate and HUD has not been directed to take any action outside its legal powers. Furthermore, in the event that the district

court determines that remedial action is required by any of these local authorities, they will have ample opportunity to be heard on the matter.

Most important, however, HUD is not limited to acting through local housing authorities to implement federal housing policies. The petitioner can work with private housing developers to provide low-cost housing throughout the Chicago metropolitan area and a remedy as applied to the suburbs need not entail the involvement of local housing agencies. In addition, the relief envisioned by the Court of Appeals is not interdistrict in nature, since HUD's usual focus with respect to carrying out its housing activities is a "housing market area." In Chicago the "housing market area" is the metropolitan region which covers a number of political jurisdictions. Finally, to limit the relief here to the confines of the inner-city would contravene the Congressional directive to HUD to seek metropolitan solutions for the provision of low-cost housing.

A. HUD Is Authorized to Contract with Private Developers and Non-Profit Organizations to Provide Low-Cost Housing Opportunities and Need Not Rely Upon Local Housing Authorities.

Contrary to the theme reasserted throughout petitioner's brief, Federal housing programs are not beholden to local authorities and local control. In enacting the Housing and Community Development Act of 1974, Congress provided substantial authority for HUD to contract directly with private developers for the purpose of aiding lower income families in obtaining a decent place to live.

The 1974 Act establishes a new housing assistance program which is an outgrowth of the leased housing program begun in 1965. Under the old program a local

housing authority could lease units in private structures for rental by low income persons; HUD was limited to dealing through the local authority. The 1974 revisions, contained in Section 8 of the United States Housing Act of 1937 as revised (42 U.S.C. § 1437f), now permit HUD to select developers directly in the absence of a local housing authority or where HUD determines that an existing housing authority is unable to implement the purposes of the law. The Secretary may "enter into such contracts and to perform the other functions assigned to a public housing agency by this section." 42 U.S.C. § 1437f(b)(1).[1]

Even prior to the new Section 8, HUD was authorized to implement its housing programs by dealing directly with private developers. This was accomplished through the Section 236 and 235 programs, established pursuant to the Housing and Urban Development Act of 1968. 12 U.S.C. §§ 1715z and 1715z-1. The Section 236 program is designed to provide lower cost rental units. A qualified sponsor can receive FHA insured mortgage financing thereby reducing the interest cost to as low as one percent for a term of up to 40 years for either rehabilitation or new construction of multi-family units. Because of the reduced mortgage rate, rental cost for low-income tenants can be limited to 25 percent of the tenant's income. The upper income limit for

[1] The new Section 8 programs permits assistance on behalf of new, substantially rehabilitated, or existing rental units through assistance payment contracts with owners. Eligible families include those with annual family incomes not in excess of 80% of the median income in the area. Aided families will be required to contribute 15% to 25% of their total income for rent. While 100% of the units in a development may be assisted, HUD is to give preference to projects involving not more than 20% assisted units. 42 U.S.C. § 1437f(c).

families to be eligible for residency in a 236 project is 135 percent of the public housing initial occupancy limit in the area where the project is located. The Section 235 program allows for home ownership and functions in a fashion similar to the 236 program. Qualified sponsors can obtain subsidies to reduce interest rates, the benefits of which are then passed on to qualified lower income applicants. The important point is that qualified sponsors can apply directly to HUD for 236 or 235 financing without the involvement of a local housing authority and indeed whether or not such authority is even present in the jurisdiction where the project is proposed.

HUD seeks to minimize the significance of these programs by stressing housing development under the authority of a local housing agency. Pet's Br., pp. 29-34. While conceding that it may contract directly with a private developer under the new Section 8 program, HUD chooses to emphasize the effective control that local jurisdictions can exercise over developers through zoning regulations and other local approvals. (Pet's Br., p. 34). This, of course, is a far different proposition from the assertion that federal housing programs operate only through local government instrumentalities. Rather, it is an attempt by HUD to raise the specter of a developer running the gauntlet established by a variety of local agencies with powers to effectively block low-cost housing developments. Local governments of course do have authority over the use of land, but such authority must be exercised within appropriate limits and for non-invidious reasons. In recent years lower federal courts on numerous occasions have been called upon to assist developers of federally subsidized housing projects who have been confronted with local

interference. These courts have fashioned a strict standard of review and have imposed upon local governmental agencies a substantial burden to justify interference with these housing efforts. See, e.g., *United States* v. *City of Black Jack,* 508 F.2d 1179 (C.A. 8, 1974), *cert. denied,* —— U.S. ——, 95 S.Ct. 2656 (1975); *United Farmworkers of Fla. Housing Project, Inc.* v. *City of Delray Beach, Fla.,* 493 F.2d 799 (C.A. 5, 1974); *Dailey* v. *City of Lawton, Okla.,* 425 F.2d 1037 (C.A. 10, 1970); *Kennedy Park Homes Ass'n.* v. *City of Lackawanna, N.Y.,* 436 F.2d 108 (C.A. 2, 1970), *cert. denied,* 401 U.S. 1010 (1971); *Crow* v. *Brown,* 457 F.2d 788 (C.A. 5, 1972), *aff'g,* 332 F. Supp. 382 (N.D. Ga. 1971).

In short, contrary to petitioner's assertions, a remedy directed to HUD does not necessarily involve local housing authorities. If and when local jurisdictions seek to interpose their authority to interfere with the implementation of the remedy, their actions are subject to careful judicial review.

The petitioner further attempts to undermine the significance of the recent housing assistance program by pointing out that the Secretary of HUD must submit applications by private developers for funding under Section 8, as well as under 236 and 235, to a local governmental unit for review where that unit has filed a housing assistance plan pursuant to section 104(a)(4) of the 1974 Act. See, Pet's Br., p. 34, n.28. The local governmental entity is given the opportunity to determine whether the request for housing assistance by a private developer is consistent with that plan. 42 U.S.C. § 1439(a). Petitioner contends that this is further indication of a congressional policy to defer to local governmental entities. To the contrary, housing assistance

plans are not, as HUD implies, devices for allowing the exercise of local veto power, but rather a method for assuring that the housing needs for lower income people are met.[2]

The filing of housing assistance plans by local governments is required in connection with applications for block grants for community development purposes. The plans must include a survey of the condition of the community's housing stock, establish the number of needed units for persons expected to reside in the community, and indicate the general locations of housing units for lower income persons. With respect to housing lower income persons, the plan must be drawn with the objective of "promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons. . . ." 42 U.S.C. § 5304(a)(4)(C). Thus, the granting of community development funds is tied to the submission of an acceptable plan which takes into consideration the housing needs of lower income people throughout a metropolitan area. The housing assistance plan requirement is clearly designed to insure metropolitan-wide planning and equitable housing development on a regional basis. See, e.g., H. Rep. No. 93-1114 (93rd Cong., 2d Sess. 1974) at pp. 7-8; 24 C.F.R. § 570.303(c).

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[2] Furthermore, some communities may not be entitled to community development funds or may choose not to apply for funds. In fact, numerous communities around the country have opted to forego receiving Federal community development funds under the 1974 Act, notwithstanding entitlement to a grant allocation pursuant to the formula contained in the Act. These decisions to turn away federal monies undoubtedly are intended to avoid committing the local jurisdiction, through the filing of a housing assistance plan, to provide housing for low income people.

The *amici* do not take issue with the fact that local housing authorities have played a major role in providing lower cost housing opportunities through federal supplements. Contrary to the petitioner's view, however, it is evident that the response to national housing needs is not exclusively through these local authorities and that HUD has substantial authority to operate directly with local developers. Indeed, as evidenced by the 1974 revisions to the Housing Act, the legislative trend is towards more direct involvement by HUD with the private market and less dependence on traditional public housing carried forward by local housing authorities.

B. In Accordance with a Congressional Policy to Deconcentrate Low-Cost Housing Throughout Metropolitan Areas, HUD's Primary Focus for the Administration of Its Housing Programs Is the Overall Housing Market Area, Rather Than Limited Geographical Political Entities.

The planning and execution of HUD housing programs are not cabined by the arbitrary boundaries of particular political jurisdictions. HUD operates its programs throughout "housing market" areas, generally on a metropolitan-wide basis. This is in furtherance of a strong congressional policy of deconcentrating housing opportunities for low income and minority persons. This Congressional policy would be frustrated should HUD be limited to planning and executing its low-cost housing programs within the narrow confines of discrete political entities. With respect to HUD housing program activities, therefore, the appropriate district for purposes of viewing and considering meaningful relief to correct the effect of past discriminatory actions is the metropolitan area or the overall Chicago housing market area.

1. The Housing and Community Development Act of 1974 Seeks to Deconcentrate Low-Cost Housing Programs Throughout Metropolitan Areas.

The Congressional goal of deconcentrating low-cost housing programs throughout metropolitan regions was most recently and forcefully set forth in the Housing and Community Development Act of 1974. Congress, in restructuring federal housing and community development assistance programs, did so with a view toward resolving the problems attending racial and economic isolation of lower income citizens in deteriorated inner-city housing. Congress declared that "the Nation's cities, towns, and smaller urban communities face critical social, economic and environmental problems arising in significant measure from . . . the growth of population in metropolitan and other urban areas, and the *concentration of persons of lower income in central cities. . . .*" (emphasis added). 42 U.S.C. §5301(a). Congress went on to indicate that its primary objective in enacting the 1974 law was "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c).

To accomplish these purposes, Congress placed special emphasis on metropolitan-wide planning and equitable housing development on a regional basis. Congress provided that applications for community development funds under the 1974 Act may not be approved unless the applicant submits an application setting forth "a three-year community development plan which identifies community development needs, demonstrates a comprehensive strategy for meeting

those needs, and specifies both short- and long-term community development objectives which have been developed in accordance with *areawide development planning and national urban growth policies*" (emphasis added). 42 U.S.C. § 5304(a)(1). Also, as noted above, the local housing plan must survey the housing stock of the community and assess, among other things, the number of housing units necessary to meet the needs of persons "expected to reside in the community." The housing plan, in addition, must indicate general locations of proposed units for lower income persons with a major objective being the promotion of "greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons . . . ." 42 U.S.C. § 5304(a)(4)(C). The significance Congress attached to the filing of an acceptable housing assistance plan is attested to by the fact that it is the only substantive portion of the community development grant application that may not be waived by HUD. 42 U.S.C. § 5304(b)(3).

The legislative history of the 1974 law reveals that Congress intended HUD to proceed on a metropolitan-wide basis in responding to the nation's housing problems. The House Committee on Banking and Currency, in its report on this legislation, stated that it regarded "as most important the provisions of the bill requiring the submission by all applicants of a housing assistance plan." H. Rep., No. 93-1114 (93rd Cong. 2d. Sess. 1974) at p. 7.[3] The House Committee

[3] The House report is the significant legislative history on this matter as the requirement that applicants file a housing assistance plan with HUD is derived from the House of Representatives version of the 1974 Act. H.R. 15361. The Senate version, S. 3066,

pointed out that a metropolitan-wide scope was essential in shaping local housing assistance plans and that dispersal of housing throughout a metropolitan region was a primary goal. The Committee stated: "The committee wishes to emphasize that the bill requires communities, in assessing their housing needs, to look beyond the needs of their residents to those who can be expected to reside in the community as well." *Id.* at 7-8.

HUD regulations implementing the 1974 Act are responsive to the Congressional mandate that HUD use the review process to encourage dispersal of lower cost housing throughout metropolitan areas. 24 C.F.R. § 570.303(c). The regulations emphasize that in evaluating the housing assistance needs of lower income persons, an applicant community must take into consideration not only the needs of existing residents but the needs of persons expected to reside in the community as a result of planned or existing employment facilities. 24 C.F.R. § 570.303(c)(2). Furthermore, in selecting locations for the construction of new housing for lower income persons, the applicant community is to proceed with the objective of "[p]romoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons." 24 C.F.R. § 570.303(c)(4)(ii).

had instructed HUD to make housing subsidies available and to achieve general conformity with the housing plans of the state and general unit of government. The Senate did not, however, define the contents of such housing plans. The Act, as adopted by Congress, followed the House approach with the final bill focusing on the housing assistance plans as a condition of eligibility for community development funds, rather than for housing subsidies.

Recently HUD circulated a memorandum to all regional administrators and all area office directors emphasizing the importance of the estimate of housing needs as set out by applicant communities in community development fund applications. (HUD Memorandum, from David O. Meeker, Jr., Community Planning Development, May 21, 1975.) The memorandum urged local HUD representatives to consider journey-to-work tables of the U.S. Bureau of Census in evaluating housing assistance plans and stated that where an applicant has failed to estimate the housing needs of persons employed in the community but unable to live there, HUD must take steps to strengthen the applicant's "needs assessment."

2. Other Laws and Regulations Further the Policy of Metropolitan Residential Desegregation.

The filing of housing assistance plans by local communities conforms with and implements the goals and purposes that Congress set forth in the Federal Fair Housing Law of 1968. 42 U.S.C. §§ 3601, *et seq.* In that law, Congress provided that it was the policy of the United States to insure fair housing throughout the United States (42 U.S.C. § 3601), and directed all federal executive departments and agencies, and specifically HUD, to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter." 42 U.S.C. § 3608(d)(5).[4] Title VI

[4] HUD regulations implementing the 1974 Act with respect to community development funds call for "affirmative action" on the part of recipients "to overcome the effects of conditions which would otherwise result in limiting participation by persons of a particular race, color, national origin or sex." 24 C.F.R. § 570.601 (4)(ii).

of the Civil Rights Act of 1964 barring "discrimination under any program or activity receiving Federal financial assistance" (42 U.S.C. § 2000d) also imposes a higher affirmative duty on HUD to halt patterns of discrimination in federally subsidized housing programs, and Title VI nondiscrimination provisions are specifically included in the 1974 Act. 42 U.S.C. § 5309.

In furtherance of its responsibility to act affirmatively to promote equal housing opportunities, in 1972 HUD adopted regulations establishing project selection criteria for lower income housing developments and setting out affirmative marketing standards for FHA financed housing. With respect to both sets of regulations, HUD proceeded with a view toward promoting metropolitan residential desegregation and incorporated the housing market area as a relevant geographic district for purposes of implementation of the new standards.

The project selection criteria were designed to assist in evaluating requests for priority registration and reservation of contract authority for low-cost housing project subsidies. 24 C.F.R. § 200.700. Among the criteria included for evaluating development proposals is the sponsor's ability to achieve the objective of providing "minority families with opportunities for housing in a wide range of locations" and to "open up nonsegregated housing opportunities that will contribute to decreasing the effects of past housing discrimination." Superior ratings are to be afforded those projects which *"within the housing market area, . . .* will provide opportunities for minorities for housing outside existing areas of minority concentration and outside areas which are already substantially racial-

ly mixed. . . ." (emphasis added). *Id.* Significantly, HUD in its introductory statements to the promulgation of the project site election criteria noted that it had specifically rejected a request that it limit the term "housing market area" as used within the regulations to the boundaries of local political jurisdictions. HUD stated: "the Department has declined to adopt the suggestions because housing market areas often are independent of arbitrary political boundaries and allotments to certain parts of those areas could result in the Department's approving projects which would be less than the best that could be created for the people of each housing market area." 37 Fed. Reg. 203 (1972).

To assure equal access to lower cost housing, HUD's regulations require that an affirmative marketing program be in effect for all multi-family projects to be undertaken with FHA subsidy. The program must include means for publicizing to minority persons the availability of housing opportunities, with publication to take place through "the type of media customarily utilized by the applicant, including minority publications or other minority outlets which are available in the housing market area." 24 C.F.R. § 200.620(a). The HUD circular providing detailed instructions for filing an affirmative marketing plan makes clear that a metropolitan region is to be considered in devising a proper plan. The circular states:

> The affirmative fair housing plan . . . shall be designed to attract applications for the housing from all in the SMSA [standard metropolitan statistical area], or if there is no SMSA, the housing market area, including whites, Blacks, Spanish-Americans, Orientals, American Indians, and other groups which are subjected to housing discrimination on the basis of race, color, religion or national origin. HUD Circular 8030.2 Rev., App. 2, p. 3, June, 1973.

The Federal government also has emphasized regionalism in land use and housing planning. This focus grows out a long standing recognition that a national housing policy can be implemented only on a regional basis.

Congressional commitment to regional planning emerges clearly in the Housing Act of 1954. That law established a comprehensive Planning Assistance Program, known as the "701" program, with a goal toward stimulating the state to create regional planning bodies. 40 U.S.C. § 461(a). The law provided for federal grants for the undertaking of comprehensive planning by state, metropolitan and regional planning agencies. In 1959, Congress amended the 701 program to require that, "[p]lanning assistance under this section shall, to the maximum extent feasible, cover *entire urban areas* having common or related urban development problems" (emphasis added). Housing Act of 1959, Pub. L. No. 80-372, § 701(a), 73 Stat. 678. In addition, "[t]he Administrator is authorized, in areas embracing several municipalities or other political subdivisions, to encourage planning on a unified metropolitan basis and to provide technical assistance for such planning and the solution of problems relating thereto." *Id.* § 701(c), 73 Stat. 679.[5]

[5] In 1965 Congress again amended the 701 program to reemphasize the need for metropolitan planning. "To the maximum extent feasible, all grants under this subsection shall be for activities relating to all the developmental aspects of the total metropolitan area or urban region, including, but not limited to, land use, transportation, housing, economic development, natural resources development, community facilities, and the general improvement of

HUD characterizes the goals of the 701 program with respect to housing, as including the elimination of past racial discrimination, developing growth policies which will insure provision of an adequate supply of housing with a variety of housing types and a proximity of housing to jobs, and the provision of a decent residential environment throughout regional planning areas.[6]

In 1968 Congress required that a "housing element" be included as part of the comprehensive planning activity of any agency receiving federal urban planning assistance funds. Housing and Urban Development Act of 1968, Pub. L. 90-448, 82 Stat. 528, amending 40 U.S.C. § 461(a). The purpose of the housing element is to insure that housing needs of the region and local communities will be included in planning efforts undertaken with federal dollars. Its inclusion in the federal planning statutes reemphasizes the congressional recognition that lower cost housing must be approached on an area wide basis. HUD itself has stated that a planning agency's housing element must specifically consider "the needs and desires of low-income and minority groups."[7]

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living environments." Housing and Urban Development Act of 1965, Act of Aug. 10, 1965, Pub. L. No. 89-117 § 701(g), 79 Stat. 502-503. And, as we develop further, *infra*, Congress in the Housing and Urban Development Act of 1968 again amended the 701 provisions, this time to insure that comprehensive planning take into account housing needs. Pub. L. No. 90-448, 82 Stat. 528.

[6] HUD Handbook 1, Comprehensive Planning Assistance Requirements and Guidelines for a Grant 4-8 (Mar. 1972).

[7] HUD Circular, Areawide Planning Requirements (MPD 6415.1A, 7-31-70), Section III, Comprehensive Planning Certification. Regional planning received further federal support through the Federal Office of Management and Budget's Circular A-95.

It is evident, therefore, that with respect to planning for, promoting and carrying forward our nation's lower cost housing programs, HUD's operations are not confined by political boundaries, but encompass entire housing market areas. Since the entire housing market area is the focus of HUD's activities, discrimination in which the agency is involved in any part of a particular area requires remedial relief throughout the area. This view is supported by this Court's ruling in *Keyes* v. *School District No. 1, Denver, Colo., supra.* In *Keyes,* this Court held that a finding of discrimination in a major portion of the Denver school district provided the basis for fashioning a district-wide remedy. This Court's ruling in *Keyes* was predicated on the common sense view that, lacking evidence to the contrary, racial segregation in other portions of this district must be presumed to be a reciprocal effect of the *de jure* practices demonstrated and reflective of the same discriminatory intent. Similarly, the finding of discrimination within

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This Circular creates a Project Notification and Review System and sets procedures whereby regional planning agencies serve as metropolitan clearinghouses to review and comment on local applications for various federal grants-in-aid, including community development grants. United States Office of Management and Budget, Circular A-95 (Rev. Feb. 9, 1971). The A-95 Circular was promulgated by OMB pursuant to Title IV of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §§ 4231 *et seq.,* and the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. §§ 3301 *et seq.* The Clearinghouse comments are to be based on planning, environmental or civil rights criteria. The agency may consider whether the application is consistent with the comprehensive planning goal for the area and whether the project contributes to a more balanced pattern of residential settlement. See, Testimony of Arnold Weber, Associate Director, Office of Management and Budget, *Hearing Before the United States Commission on Civil Rights,* 350-63, 449-83 (Washington, D.C. 1971).

the inner-city portion of the Chicago market area along with evidence of racial segregation throughout the area justifies relief involving the entire market area.

3. Current Congressional Policies of Deconcentrating Low-Cost Housing Are Responsive to Past Racial Discrimination and Its Damaging Consequences.

Congress in shaping these civil rights laws and, in particular, when fashioning the structure of the 1974 Act with respect to deconcentration of lower cost housing opportunities, was responding affirmatively to the need to undo patterns of racial segregation in housing that the federal government had helped to establish in the first place. The existence of these patterns and the federal role in their creation has been documented in numerous reports and recommendations of government agencies and commissions.

The findings of the National Advisory Commission on Civil Rights Disorders (Kerner Commission) have been particularly significant. For example, the Commission noted:

> Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them. Report of *The National Advisory Commission on Civil Disorders,* 13 (1968).

The Commission called for the reorientation of "[f]ederal housing programs to place more low—and moderate—income housing outside of ghetto areas." *Id.*

Similarly, the President's Committee on Urban Housing (Kaiser Commission) in 1968 stated:

> Past housing programs have allowed very little choice on the part of recipients, except the choice of continuing to live in deteriorating slum housing. Public housing, for example, has offered only rental units, usually located within or on the fringes of city slums. Artificial restrictions which restrict the location of subsidized housing should be eliminated so that recipients of assistance would have the widest possible choice of where to live. Removal of restrictions will allow people to locate near places of employment. President's Committee on Urban Housing, *A Decent Home,* 47-48 (1968).

In 1974 the United States Commission on Civil Rights in evaluating equal opportunities in our nation's suburbs found that, "the exclusion of minorities from suburbs diminishes their housing alternatives and often forces minorities to live in substandard inner city housing." U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia,* 67 (1974). The Commission then went on to recommend that "[c]ongress should enact legislation aimed at facilitating free housing choice throughout metropolitan areas for people of all income levels on a nondiscriminatory basis. . . ." and called for "the adoption of a national public policy designed to promote racial integration of neighborhoods throughout the United States." *Id.* at 69-70.

With respect to past Federal support of discriminatory housing practices, the Commission on Civil Rights also stated, "[s]ince the 1930's the Federal Government has supported a variety of programs to increase the supply of housing and to facilitate urban

development or redevelopment. Through these activities, the Federal Government has played a primary role in contributing to our segregated housing patterns." *Id.* at 36.

Former President Nixon in a major statement in 1971 on equal housing opportunity also confirmed the Government's responsibility for past support of racial segregation.

> Federal policy itself, quite unsurprisingly, in past eras reflected what then were widespread public attitudes. Policies which governed FHA mortgage insurance activities for more than a decade between the middle thirties and the late forties recognized and accepted restrictive covenants designed to maintain the racial homogeneity of neighborhoods.
>
> Compounding the plight of minority Americans, locked as many of them were in deteriorating central cities, was the Federal urban renewal program. It was designed to help clear out blighted areas and rejuvenate urban neighborhoods. All too often, it cleared out but did not replace housing which, although substandard, was the only housing available to minorities. Thus it typically left minorities even more ill-housed and crowded than before.
>
> Historically, then the Federal Government was not blameless in contributing to housing shortages and to the impairment of equal housing opportunity for minority Americans. Much has been done to remedy past shortcomings of Federal policy, and active opposition to discrimination is now solidly established in Federal law. But despite the efforts and emphasis on recent years, widespread patterns of residential separation by race and of unequal housing opportunity persist. Statement of Richard M. Nixon, June 11, 1971. Quoted in *Hearing Before the United States Commission on Civil Rights* (Washington, D.C. 574-75 1971).

The indifference to racial discrimination shown by HUD in the instant case led the lower court to state, "[i]ndeed, anyone reading the various opinions of the District Court and of this Court quickly discovers a callousness on the part of the appellees towards the rights of the black, underprivileged citizens of Chicago that is beyond comprehension." *Gautreaux* v. *Chicago Housing Authority,* 503 F.2d 930, 932 (C.A. 7, 1974).

The numerous reports, findings and calls for action certainly charted the course Congress has followed in recent years in establishing federal equal housing laws.

C. The Lower Court Was Obligated to Fashion a Remedy Which Would Effectuate Underlying Congressional Policies and Goals to the Fullest Possible Extent.

The burden of the foregoing arguments is that the decision of the Court of Appeals does not entail interdistrict remedies within the scope of the *Milliken* ruling, since relief here is directed to HUD and requires it to act only within its normal sphere of operation (in this case the Chicago housing market area), and conforms with the Congressional policy of deconcentrating lower cost housing opportunities outside the inner-city. In addition, *amici* contend that the very existence of this underlying Congressional policy provided an independent basis of support for the lower

court's effort to fashion equitable remedies to accomplish a metropolitan solution to the housing problem.

This Court has long held that a federal court, sitting as a court of equity, has broad powers to fashion to the extent possible remedies necessary to effectuate congressional purposes. See, *Porter* v. *Warner Co.*, 328 U.S. 395 (1946); *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Edelman* v. *Jordan*, 415 U.S. 651, 672, n.15 (1974); *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Dietrick* v. *Greaney*, 309 U.S. 190 (1940). In the *Borak* case, for example, this Court, in interpreting the Securities Exchange Act of 1934, stated, "[w]e, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. at 435. Similarly, in interpreting the scope of the National Bank Act, the Court in *Dietrick* v. *Greaney* stated, "[b]ut it is the federal statute which condemns as unlawful respondent's acts. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted." 309 U.S. at 200-201.

The underlying legislative policies in this case emerge from the metropolitan desegregation goal contained in the Housing and Community Development Act of 1974, the directive that HUD act affirmatively to promote equal housing opportunities set forth in the Federal Fair Housing Act of 1968, and the prohibition of discrimination in federal programs contained in Title VI of the Civil Rights of 1964. In

recent years this Court also has instructed that an expansive reading must be afforded the Civil Rights Laws of 1964 and 1968 in order to assist Congress in fulfilling its goal of eliminating segregation and discrimination. See, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, —— U.S. ——, 45 L. Ed. 2d 280 (1975); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).[8] Thus, we deal here with a factor not present in *Milliken*, i.e., the provision by the lower court of a remedy clearly in accordance with a congressional objective.[9]

The petitioner attempts, however, to combat this significant distinction between the instant case and

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[8] The lower courts have followed this lead, also calling for an expansive interpretation of Title VIII of the Civil Rights Act of 1968, the Federal Fair Housing Law. See *Williams* v. *Matthews Co.*, 499 F.2d 819 (C.A. 8, 1974); *United States* v. *City of Black Jack, Mo., supra; Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (C.A. 2, 1973).

[9] *Milliken* raised no underlying legislative purpose which the court was required to effectuate. If anything, Congress has shown an antipathy to metropolitan approaches to school desegregation.

In the Equal Educational Opportunities Act of 1974, Title II of the Education Amendments of 1974, 20 U.S.C. §§ 1701 *et seq.*, for example, the Congress declared it to be the policy of the United States that "the neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. § 1701(A)(2). The Act also specifically required that in the formulation of remedies under it school district lines were not to be altered except upon proof that the lines were drawn for the purpose, and had the effect, of segregating children, or upon proof that, as a result of discriminatory practices within the school districts, the lines had the effect of segregating children. 20 U.S.C. §§ 1715 and 1756.

Milliken by itself fashioning a statutory argument in opposition to the Court of Appeals decision. HUD argues that the ruling below contravenes a Congressional policy embodied in Section 602 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1. This section provides that in the event of a violation of any nondiscrimination requirement of Section 601 of the Act, the sanction imposed should be limited to the particular political entity found to have been in violation and to the particular program affected. See Pet's Br. p. 18, n.15. This is the so-called pinpoint provision of Title VI, and is intended to protect against cut-off of federal funds to jurisdictions not found guilty of discrimination. The petitioner maintains that the relief ordered by the Court of Appeals punishes innocent beneficiaries of federal programs in the absence of a finding of discriminatory actions and that the Court of Appeals therefore has violated the Congressional policy incorporated in Section 602.

HUD identifies these innocent beneficiaries as "suburban public housing applicants" who may be displaced by an order requiring that housing be made available to inner-city low-income blacks.

But the "pinpoint provision" of Title VI has absolutely no application to a court order designed not to terminate funds but to confer a benefit on a class which has suffered as a result of governmental discrimination. The Court of Appeals has not sought to deny already allocated funds to suburban housing authorities, nor has it sought to displace suburban residents from access to lower-cost housing opportunities. Rather metropolitan redress simply compels HUD to promote added housing opportunities for the poor in the suburbs; it does not curtail housing for the poor

who currently reside outside the inner-city. Thus, the petitioner's effort to pose the interests of poor suburban whites against the needs and aspirations of poor inner-city blacks is specious and unworthy. This Court should reject it out of hand.

II

THE DECISION BELOW REQUIRING A METROPOLITAN REMEDY TO RESOLVE THE HOUSING PROBLEMS OF LOWER INCOME CITIZENS NEITHER PRESENTS MAJOR PRACTICAL PROBLEMS, NOR CONFLICTS WITH WELL ESTABLISHED TRADITIONS WHICH DICTATE AGAINST SUCH RELIEF.

In *Milliken,* this Court was deeply troubled by the practical problems inherent in implementing an interdistrict remedy. The Court noted that an interdistrict remedy would, in effect, require the consolidation of numerous independent school districts and would create many logistical difficulties of great complexity. The Court especially stressed the tradition of neighborhood schools. 418 U.S. at 741-42. The Court of Appeals in the instant case specifically considered the concerns expressed in *Milliken* and found them inapplicable to the question of metropolitan housing desegregation. Instead, the court concluded that metropolitan relief as to HUD is "necessary and equitable." *Gautreaux* v. *Chicago Housing Authority,* 503 F.2d 930, 936 (C.A. 7, 1974).

A. The Lower Court Correctly Concluded That Metropolitan Housing Desegregation Did Not Pose Practical Problems or Conflict with Tradition As Was the Case in *Milliken.*

The *amici* support the lower court's view that neither tradition nor major practical problems prevent HUD from carrying out a metropolitan remedy. It is

our position that the problems that must be solved to implement metropolitan school segregation simply do not arise in the housing area. Nor is there a strong tradition for dealing with the needs for lower income housing on a local basis. Regional approaches to residential desegregation are practical and essential to meaningful relief.

The lower court plainly was correct in concluding that there is no tradition of local control in matters relating to public housing. As the Court said, "[t]here is no deeply rooted tradition of local control of public housing; rather, public housing is a federally supervised program with early roots in federal statutes . . . There has been a federal statutory commitment to nondiscrimination in housing for more than a century, . . . and the Secretary of HUD is directed to administer housing programs 'in a manner affirmatively to further the policies' of non-discrimination." *Gautreaux* v. *Chicago Housing Authority, supra* at 936.

We already have considered some of the practical aspects of a metropolitan remedy in this case. We have noted that HUD's usual focus for administering subsidized housing programs is the Chicago market area, and that HUD has the authority and the responsibility to deal directly with private housing developers in subsidizing lower cost housing, without the intervention of local housing authorities. Unlike *Milliken,* where it may have been necessary for as many as 54 independent school districts to merge "into a vast new super school district," 418 U.S. at 743, here there is no issue of possible consolidation of independent political entities.

The Court in *Milliken* also noted the need for "large-scale transportation of students" to accomplish interdistrict school desegregation. *Id.* The ultimate construction of low cost housing in the suburbs presents no similar problem of transportation. The remedy here is complete once the necessary housing is built; it is not a continuing, daily remedy as in the case of school transportation. Nor does the lower court's order here pose problems with respect to financing, levying of taxes, and bonding authority, other troubling issues considered in *Milliken.* It is HUD's statutory business to aid construction of lower cost housing; it is only a question of where this housing is to be built. Finally, the practical issues relating to school administration, such as judgments concerning curricula, attendance zones, equipment purchase, involvement of elected school boards, noted in *Milliken,* do not emerge as a result of a metropolitan approach to housing. The statutory scheme already outlined as to federal housing programs eliminates this type of concern. HUD's day to day operations entail the support of lower cost housing and the Court of Appeals' order does not disturb this basic pattern. The lower court's decree simply does not involve the "complete restructuring" of the federal housing laws and programs; rather the order is consistent with HUD's statutory duty to promote the deconcentration of housing opportunities.

B. The Decision Below Is In Accord with the Dictates of Sound Urban Planning.

HUD's statutory duty to promote the deconcentration of housing opportunities and to operate in housing market areas is based on principles of planning

developed to promote the most effective implementation of housing programs. Planners generally recognize that the most practical and effective way to develop housing programs is by focusing on the broader metropolitan region.

Numerous factors account for the metropolitan emphasis in urban planning. The interrelationship between access to jobs and availability of housing is certainly critical. As job opportunities are established in suburban areas, creation of lower cost housing opportunities for workers near to those jobs becomes a major concern for employers as well as employees.[10] Former Assistant Secretary of HUD Samuel J. Simmons has described this problem:

> As whites have left the cities, jobs have left with them. After 1960, three-fifths of all new industrial plants constructed in the country were outside of central cities. In some cases, as much as 85% of all new industrial plants located outside central cities were inaccessible to Blacks and other minorities who swelled ghetto populations.[11]

The court below recognized the critical problems created by separating housing and employment opportunities and warned: "we must not sentence our poor, our underprivileged, our minorities to the jobless slums of the ghettos and thereby forever trap them in the vicious cycle of poverty which can only lead them to lives of crime and violence."[12]

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[10] Davidoff and Davidoff, "Opening the Suburbs: Toward Inclusionary Land Use Controls," 22 *Syracuse L. Rev.* 509 (1971).

[11] Quoted in *Gautreaux* v. *Chicago Housing Authority*, 503 F.2d 930, 938 (C.A. 7, 1974).

[12] *Id.* at 938.

It also is essential to understand that suburban communities do in fact look to the inner-city as the locus of a region's economic, social and political life. Indeed, the inability to achieve social equity within confined political boundaries and the very complexity of our metropolitan communities mandate a more comprehensive approach. According to former Secretary of HUD, George Romney, "[t]he City and the suburbs together make up what I call the 'real city.' To solve problems of the 'real city,' only metropolitan-wide solutions will do."[13]

Unlike the local school district emphasis in education, in the field of urban planning, regional and metropolitan approaches have dominated at least since the 1930's. In 1938, for example, Lewis Mumford, in a study of the problems of our cities saw the need for a regional focus in the planning profession.[14] In 1942, as the nation's economy started to revive from the depression, planner Louis Wirth strongly advocated the metropolitan region as the most appropriate planning unit.[15] Today metropolitan wide planning is basic to the planner's approach to resolution of our urban problems.

Thus, one planner in stressing the need for regional approaches in his discipline has stated:

> If this description of the spatial structure of a developing economy is substantially correct, we

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[13] *Id.* at 937.

[14] Lewis Mumford, *The Culture of Cities* (New York: Harcourt, Brace and Co., 1938).

[15] Louis Wirth, "The Metropolitan Region as a Planning Unit," *National Conference on Planning*, Proceedings of the Conference held at Indianapolis, Indiana, May 25-27, 1942 (Chicago, American Society of Planning Officials, 1942), pp. 141-151.

> conclude that the city region has, in fact, become the basic areal unit for carrying out comprehensive developmental planning below the national level. It is a region defined by an intricate pattern of economic and social interdependencies; it is, therefore, a "community" informed of certain common interests; and above all, the locus of socio-economic power for a broader geographic area. Friedman, "The Concept of a Planning Region—The Evolution of an Idea in the United States," reprinted in Friedman and Alonso, *Regional Development and Planning* 511-12 (M.I.T. Press 1964).

Another commentator, in noting the need for managed growth policies, echoed this view:

> Individual communities must consider the regional impacts of their decisions. Regional planning and management is moving from the status of an advisory exercise in wishful thinking to a mandated requirement of many governmental activities. The local community must respond to a growing and sometimes bewildering variety of regional criteria dealing with economics, with social equity, and with environmental quality. The mechanisms for expressing this regional interest are as yet very imperfect, but the mandate is clear. The regional interest is to be part and parcel of any approach to managed growth. Parker, Francis H. "Regional Imperatives and Managed Growth," III *Management and Control of Growth* 284 (Urban Land Inst. 1975).

This emphasis on regionalism is rooted in the recognition that fundamental urban developmental decisions cannot be left to the unfettered discretion of a multitude of individual political jurisdictions operating independently of each other. This basic understanding repeatedly is stressed in the planning literature and receives special emphasis when issues of equal housing opportunities are raised.[16] Left to their own devices, each political entity will close out lower cost housing for a variety of reasons, including possible adverse property tax consequences, the need for additional public services or the possible alteration of the nature and character of the community. It is now widely recognized that matters such as creation of an adequate water supply provision, mass transportation, the building of highways, the disposal of solid wastes, and the insuring of environmental controls require regional solutions. Similarly, considerations of practicality as well as fairness have led planners to conclude that the provision of housing opportunities for all citizens entails a regional solution and an equitable allocation system.[17]

C. Metropolitan Approaches Are Essential to This Country's Welfare

Practical considerations do not militate against metropolitan housing remedies. In fact, practical considerations are compelling as the survival of our society *requires* such remedies. Our society increasingly is being divided between black and poor inner cities and

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[16] See, e.g., Report of The National Commission on Urban Problems to the Congress of the United States (Douglas Commission), *Building The American City*, House Doc. No. 91-34 (91st Cong. 1st Sess. 1968), p. 7; Brooks, *Lower Income Housing: The Planners' Response*, 18-19 (American Society of Planning Officials, 1972).

[17] See, Franklin, Falk, Levin, *In-Zoning, A Guide for Policy-Makers on Inclusionary Land Use Programs* (Potomac Institute, 1975); *Southern Burlington County NAACP* v. *Mt. Laurel, N.J.*, 67 N.J. 151 (1975).

white and well-to-do suburbs. The Kerner Commission has most dramatically stated the problem:

> The nation is rapidly moving toward too increasingly separate Americas. Within two decades, this division could be so deep that it would be almost impossible to unite: a white society principally located in suburbs, in smaller central cities, and in the peripheral parts of large central cities; and a Negro society largely concentrated within large central cities. The Negro society will be permanently relegated to its current status, possibly even if we expend great amounts of money and effort in trying to "gild" the ghetto. . . . In the long run, continuation and expansion of such a permanent division threatens us with two perils. The first is the danger of sustained violence in our cities. The timing, scale, nature, and repercussions of such violence cannot be foreseen. But if it occurred, it would further destroy our ability to achieve the basic American promises of liberty, justice and equality. The second is the danger of a conclusive repudiation of the traditional American ideals of individual dignity, freedom, and equality of opportunity. *Report of the National Advisory Commission on Civil Disorders* 225-26 (1968).

The Commission's warning remains as timely today as when it was issued. It may be avoided if we pursue area wide solutions to our urban problems.

The decision below recognized the importance of a metropolitan approach to the effectiveness of any remedy designed to deal with housing segregation. *Gautreaux* v. *Chicago Housing Authority, supra* at 936. Affirmance of the decision of the Court of Appeals will help to insure that the divisions in our society described by the Kerner Commission will not become permanent.

CONCLUSION

Fore the foregoing reasons *amici* respectfully request that the decision of the Court of Appealst be affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,

Petitioner,

v.

DOROTHY GAUTREAUX, ET. AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICI CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i
INTEREST OF AMICI CURIAE 1
STATEMENT OF FACTS 4
ARGUMENT
Introduction 13
I. The Writ of Certiorari Should Be Dismissed And Review of This Matter Postponed Until After Further Proceedings in the Trial Court 14
A. Petitioner Does Not Have Standing To Attack the Judgment of the Court of Appeals on the Grounds Raised in its Petition and Brief 14
B. The Record in This Matter is Insufficient To Permit Decision of the Constitutional Claim Raised by Petitioner 19
II. Should This Court Reach the Merits, the Judgment Below Should be Affirmed Because It is Consistent With *Milliken v. Bradley* 25
CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), modified in part and aff'd, 480 F.2d 1159 (D.D.C. 1973) 8n
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945) 25
CIO v. McAdory, 325 U.S. 472 (1945) 25
County Court of Braxton County v. State ex rel. Dillon, 208 U.S. 192 (1908) 18
Diaz v. Patterson, 263 U.S. 399 (1923) 18
Gautreaux v. Chicago Housing Authority, 503 F.2d 930 (7th Cir. 1974), cert. granted, 44 L.Ed.2d 448 (1975) 12, 16n, 21

Cases, continued: Page

Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 992 (1971) 9n

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Gautreaux v. Chicago Housing Authority, 296 F. Supp. 736 (N.D. Ill. 1969) 5

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Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) 7, 8

Gautreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973) 11

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ICC v. Chicago, R.I. & P.R. Co., 218 U.S. 88 (1910). 19

Kelsey v. Weinberger, 498 F.2d 701 (D.C. Cir. 1974) 23

Massachusetts v. Mellon, 262 U.S. 447 (1923) 19

Massachusetts v. Painten, 389 U.S. 560 (1968). 21n

Milliken v. Bradley, 418 U.S. 717 (1974) . . . . . *passim*

Parker v. County of Los Angeles, 338 U.S. 327 (1949) 25

Penfield Co. v. SEC, 330 U.S. 585 (1947) 19

Rescue Army v. Municipal Court, 331 U.S. 549 (1947) 25

Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970) 2

Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 157, ___A.2d ___(1975) 2

Cases, continued: Page

Warth v. Seldin, 45 L.Ed.2d 343 (1975) 14, 15, 18, 19

Wheeler v. Barrera, 417 U.S. 402 (1974) 24n, 25

Statutes:

42 U.S.C. §§1437f(b)(1)-(2) 22n, 23n

42 U.S.C. §§1439(a)(3)-(4) 22n

42 U.S.C. §2000d 5n

42 U.S.C. §5301(c)(6) 22n

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S. Rep. No. 200, 92d Cong., 2d Sess. (1970) 3

U.S. Comm'n on Civil Rights, The Federal Civil Rights Enforcement Effort (1974) 3

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INTEREST OF AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963 following a conference of lawyers called at the White House by the President. The Committee's principal mission is to involve private

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*Both the Petitioner and the Respondents have consented to the filing of this brief. Copies of letters from their counsel to this effect have been filed with the Clerk of this Court pursuant to Rule 42(2).

lawyers throughout the country in the struggle to assure all citizens of their civil rights through the legal process, in particular by affording legal services otherwise unavailable to Black and other minority Americans pursuing claims for equal treatment under law. The Lawyers' Committee is a nonprofit, private corporation whose Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General.

The National Association for the Advancement of Colored People (NAACP) is a nonprofit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. In this respect, the NAACP has often appeared before this Court as an amicus in cases involving school desegregation, employment, voting rights, jury selection, capital punishment, and other cases involving fundamental human rights.

The NAACP and the Lawyers' Committee, and their local committees, affiliates, branches, and volunteer lawyers, have long been actively engaged in providing legal representation to those seeking free and nondiscriminatory access to decent housing. Their litigation has concerned issues similar to those in the instant case. *See, e.g., Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 157, A.2d (1975). Along with other interested organizations, the Lawyers' Committee on December 9, 1969 submitted a brief amicus curiae in the District Court in the companion case to this one. (*See* Record [*Gautreaux v. Chicago Housing Authority* file], Vol. I, Item No. 50).

The experience of amici in these cases has amply demonstrated to us the validity of the two central findings reiterated in numerous academic and official studies of housing patterns in the United States: first, that racial residential segregation is neither accidental nor desired by Black Americans, but is the product of discrimination against them; and second, that governmental policies – including, since 1937, the numerous, diversified, and omnipresent activities in the housing market of the Petitioner HUD and its predecessor agencies–are responsible in significant measure for the exacerbation and perpetuation of such racial discrimination and resulting racial residential segregation. *E.g.*, K. & A. Taeuber, *Negroes in Cities* (1965); II U.S. Comm'n on Civil Rights, *The Federal Civil Rights Enforcement Effort* (1974); *cf. Statement of HUD Secretary Romney*, S. Rep. No. 200, 92d Cong., 2d Sess. 121 *et seq.* (1970). Indeed, the segregative effects of the federal government's policies have been the more severe because their formulation and implementation coincided with the period of greatest expansion of housing and of suburban development in the United States, and because such policies served as a model for racially discriminatory actions of other governmental agencies and private parties.[1]

In the instant case, Petitioner seeks to have this Court confine, within the boundary lines of individual political subdivisions, the equitable powers of federal courts to

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[1] *See* Record (*Gautreaux v. Chicago Housing Authority* file), Vol. II, Item No. 76 (Stipulation dated June 29, 1968), Exhibit 3: "The Chicago Housing Authority, at the time of its organization, adopted a policy that had been established by the [federal] PWA Housing Division – namely, that the Authority would not permit a housing project to change the racial make-up of the neighborhood in which it was located . . . ."

remedy governmental discrimination which was never so limited in execution or effect. Any absolute limitation of this sort would cripple our efforts, and those of others, to open to minority Americans housing opportunities which until now have been closed to them because of their race. The NAACP and the Lawyers' Committee accordingly have a vital interest in the disposition of this matter. Because we believe that Petitioner has misapprehended the effect of the ruling below and because, in any event, the posture of this case is unsuited for disposition of the ultimate remedial questions before this Court, we submit this Brief as friends of the Court urging that the writ of certiorari heretofore granted be dismissed for lack of standing or as having been improvidently granted.[2]

STATEMENT OF FACTS

The parties have set forth the intricate procedural history and related factual setting of this matter in their respective briefs. For the purposes of this *amici* submission, however, we summarize the salient facts below.

This case (and the companion suit with which it was consolidated in 1971) was instituted in 1966. Plaintiffs are Negro residents of, or applicants for admission to, public housing constructed or operated by the Chicago Housing Authority [hereinafter "CHA"] and approved and financed by the United States through Petitioner

[2]As we suggest *infra* pp. 25-27, we believe that Respondents should prevail before this Court should the matter be considered on its merits, because the remand ordered by the Court of Appeals is not in any way inconsistent with nor does it foreclose application of the substantive ruling in Milliken v. Bradley, 418 U.S. 717 (1974), as Petitioner seems to believe. To the contrary, the Seventh Circuit's remand specifically requires District Court consideration of *Milliken*.

HUD and its predecessors. Both suits attacked the local and federal defendants' historic policies and practices of locating most public housing in the City of Chicago within areas of existing minority concentration, so as to maintain and aggravate racial residential segregation. Plaintiffs seek the opportunity to reside in public housing which has not been deliberately restricted to predominantly Black residential areas.[3]

Following extensive discovery in the action against the CHA (proceedings in the HUD case having been stayed), the District Court granted summary judgment in favor of the plaintiffs. The Court found that the four Chicago housing projects located in white neighborhoods had quotas to limit the admission of Negro tenants, and that CHA used a method of site selection clearance which resulted in the veto of "substantial numbers of sites [in white neighborhoods] on racial grounds."[4] The District Court rejected the possible remedy of terminating federal financial assistance to the CHA[5] because "it is not clear whether even a temporary denial of federal funds would not impede the development of public housing and thus damage the very persons this suit was brought to protect."[6] Instead, the Court directed the parties to propose appropriate injunctive relief constituting "a comprehensive plan to prohibit the future use and to remedy the past effects of CHA's unconstitutional site selection and tenant assignment procedures."[7]

[3]Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582, 583 (N.D. Ill. 1967) (denying motion to dismiss).

[4]Gautreaux v. Chicago Housing Authority, 296 F. Supp. 907, 909, 913 (N.D. Ill. 1969).

[5]*See* 42 U.S.C. §2000d (Section 601, Civil Rights Act of 1964).

[6]296 F. Supp., at 915.

[7]*Id.*, at 914.

On July 1, 1969, the District Court entered its initial remedial order against CHA. The decree established a new tenant assignment procedure for CHA projects as well as guidelines for location of future public housing. The City of Chicago was divided into a "Limited Public Housing Area" and a "General Public Housing Area" based upon existing racial residential concentrations; CHA was enjoined from locating any additional public housing in the (more heavily Black) "Limited Public Housing Area" of the city. Thereafter, at least 75% of all new public housing was to be located within the "General Public Housing Area" of the city.[8] CHA was further authorized to locate one-third of this amount (25% of all new units after the initial 700):

> . . . in the General Public Housing Area of the County of Cook in the State of Illinois, outside of the City of Chicago, provided that (whether or not constructed by CHA) the same are made available for occupancy by CHA to, and are occupied by, residents of the City of Chicago who have applied for housing to CHA. . . .[9]

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[8]Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736, 738-40 (N.D. Ill. 1969). At the time the 1969 order was entered, local housing authorities submitted estimates of public housing need to HUD and received "reservations" from the agency for specific numbers of public housing units, prior to undertaking the processes of site location and design; 700 units of a prior reservation to CHA remained. The District Court's order thus required that the balance of that reservation be located within predominantly white areas of Chicago, and that three-quarters of all public housing units built pursuant to future reservations from HUD be located in predominantly white areas. *Cf.* p. 10, *infra.* In 1969 CHA received a reservation for 1500 additional units from HUD, after making a request for 5000 units. Record, Transcript of Proceedings, September 28, 1972, at 188.

[9]*Id.*, at 739. To locate public housing for Chicago residents outside the city limits under the order, CHA not only had to enter

[footnote continued]

The order also contained provisions describing the type of public housing units CHA could build (to avoid undue concentration of public housing in any location), prohibiting CHA from using the pre-clearance site selection procedure which had in the past resulted in discriminatory location of housing, and—to ensure that a remedy was actually provided[10]—requiring CHA to use its best efforts "to increase the supply of Dwelling Units as rapidly as possible. . . ."[11] No appeal was taken from the District Court's summary judgment or from its remedial order.

Proceedings in the companion litigation against HUD were then resumed. Plaintiffs pressed their claim for relief requiring the federal agency to assist in remedying the proven discrimination, while Petitioner HUD sought dismissal of the case. On September, 1, 1970, the District Court granted the government's request; but on appeal, summary judgment in favor of plaintiffs against HUD was directed.[12] The Court of Appeals found that

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into a cooperative relationship with the Cook County Housing Authority (which it did), but also had to secure agreement from the governing body of any local political subdivision in Cook County within whose boundaries such housing was proposed to be located. *See* Brief for Petitioner, pp. 7, 29-30, 31-34. These agreements were never secured and under the 1969 order CHA has located no public housing outside the city limits of Chicago.

[10]"The Court . . . [has] determined that the several provisions of this judgment order are necessary to prohibit the future use and to remedy the past effects of the defendant Chicago Housing Authority's unconstitutional site selection and tenant assignment procedures, to the end that plaintiffs and the class of persons represented by them, Negro tenants of and applicants for public housing in Chicago, shall have the full equitable relief to which they are entitled," 304 F. Supp., at 737. *See* text at note 5 *supra.*

[11]304 F. Supp., at 739, 741.

[12]Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971).

> . . . the Secretary exercised the above described powers in a manner which perpetuated a racially discriminatory housing system in Chicago, ... The fact that HUD knew of such circumstances is borne out by the District Court's specific finding in this suit that HUD tried to block "the activity complained of, succeeded in some respects, but continued funding knowing of the possible action the City Council would take."[13]

These HUD actions, said the Court of Appeals, "constituted racially discriminatory conduct in their own right."[14]

When the case returned to the trial court, it was consolidated with the CHA litigation and plaintiffs moved for further relief, asking that all defendants be required to submit a comprehensive plan "to remedy the past effects of unconstitutional site selection in the Chicago public housing system. . . ." Record, Vol. II, Item No. 3.[15] The motion alleged that some 30,000 units

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[13] *Id.*, at 739.

[14] *Id.* There is thus no warrant for Petitioner's suggestion (Brief, p. 20 n.16) that there has been "no finding of active misconduct by HUD." The Court of Appeals expressly noted that HUD had failed to undertake appropriate action to enforce nondiscrimination by CHA, as required by the 1964 Civil Rights Act. *Id.*, at 737-38. *Cf.* Adams v. Richardson, 351 F. Supp. 636 (D.D.C. 1972), 356 F. Supp. 92 (D.D.C.), *modified in part and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973).

[15] In the interim, litigation to enforce the 1969 decree against CHA continued. In 1970, plaintiffs' counsel brought to the attention of the District Court th fact that, despite the injunction to use its "best efforts" to increase the supply of dwelling units in Chicago, and despite the specific requirement that 700 units of public housing be built in the "General Public Housing Area," and despite HUD's approval of CHA site recommendations for 1500 additional units of public housing, CHA had as yet failed to recommend any new sites to the Chicago City Council. Following

[footnote continued]

of public housing had been improperly located in segregated Negro neighborhoods as a result of defendants' discriminatory policies, and that an appropriate measure of relief was therefore the location of an additional

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an extensive series of conferences between Court and counsel – at which CHA announced that it did not wish to submit new sites until after the April 1971 mayoralty election in Chicago – the District Court modified its "best efforts" order by establishing a specific timetable requiring CHA to submit site recommendations to the City Council. CHA appealed the denial of its motion to vacate the timetable order, which was stayed pending its appeal, but the Seventh Circuit affirmed the District Court's judgment. Gautreaux v. Chicago Housing Authority, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971).

Thereafter, although CHA submitted recommendations, very few sites in the "General Public Housing Area" received City Council approval. Upon motion, the District Court enjoined HUD from distributing federal Model Cities program funds to the City of Chicago until 700 public housing units in white areas had been approved by the Mayor and Council. On appeal, entry of this decree was held to be an abuse of discretion because HUD's discriminatory activities had occurred in the context of public housing, and not Model Cities, programs. Gautreaux v. Romney, 332 F. Supp. 366 (N.D. Ill. 1971), *rev'd* 457 F.2d 124 (7th Cir. 1972).

Following that appellate ruling, the District Court dealt directly with the City Council's unexplained and unjustified failure to process CHA site recommendations in white areas by superseding, for the purposes of this case, the Illinois statutory requirement that CHA's site selections be approved by the Chicago City Council. This order was affirmed and this Court denied review. Gautreaux v. Chicago Housing Authority, 342 F. Supp. 827 (N.D. Ill. 1972), *aff'd sub nom.* Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974).

As of June 30, 1975 – six years after the entry of the first remedial order – only nine units of public housing located in other than predominantly Black areas of Chicago have been constructed. (CHA Report No. 17, p. 2). The District Court has referred the matter to a Master in an effort to determine responsibility for this lack of progress. Gautreaux v. Chicago Housing Authority, 384 F. Supp. 37 (N.D. Ill. 1974), mandamus denied, 511 F.2d 82 (7th Cir. 1975).

30,000 public housing units in integrated neighborhoods.[16] However, it recited, the "General Public Housing Area" remaining with the city limits of Chicago was insufficient to support such a number of additional public housing units located in accordance with the 1969 decree. Hence, plaintiffs suggested that relief involving construction of additional public housing without the City of Chicago should be granted, and noted that all parties had previously expressed agreement upon the desirability of a "metropolitan" remedy. Following further proceedings, plaintiffs on September 24, 1972 submitted a proposed Judgment Order embodying a form of "metropolitan" relief[17] and hearings were held September 28-29 and November 27-28, 1972.

On September 28, 1972, the CHA Director testified that CHA was applying for a new reservation of 3500 units from HUD but that, in his opinion, 75% of the units could not be located in what remained of the "General Public Housing Area" in Chicago, as defined by the Court's 1969 decree.[18] On November 27, 1972, an expert demographer tendered by plaintiffs described the rapidly shifting racial composition of Chicago's popula-

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[16] Chicago's 1973-1980 public housing needs have been estimated at 67,000 new units. Northeastern Illinois Planning Commission, *Moderate and Low-Income Housing, A Ten Year Estimate of Regional Needs* 12 (1973).

[17] Plaintiffs' proposed decree was modeled upon the 1969 remedial order. It defined a "Limited" and "General" public housing area in terms of the Chicago Urbanized Area rather than the city limits, and established floors and percentages for future site location within those areas. It suggested a mechanism whereby the District Court might vest CHA with authority to locate units outside the City of Chicago if voluntary agreement of local agencies could not be secured.

[18] Record, Transcript of Proceedings, September 28, 1972, at 65.

tion, and estimated that the "General Public Housing Area" as defined in the 1969 decree was being rapidly eliminated and would disappear entirely by about the year 2000.[19] Finally, plaintiffs presented a former U.S. Civil Rights Commission official who described the pervasive role of HUD and its predecessor agencies in creating and perpetuating racial residential segregation in private, as well as public, housing.[20] (This testimony, however, was stricken by the trial court.)[21] On September 11, 1973, the District Court entered its Memorandum Opinion and Order, in which it refused even to consider some form of "metropolitan" relief because

> the wrongs were committed within the limits of Chicago and solely against residents of the City. It has never been alleged that CHA and HUD discriminated or fostered racial discrimination in the suburbs and, given the limits of CHA's jurisdiction, such claim could never be proved against the principal offender herein.[22]

On appeal, the Court below (per Mr. Justice Clark, sitting by designation) held that "metropolitan" relief was necessary and equitable under the facts of the case, and was not inconsistent with this Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974). The initial opinion of the panel directed a remand

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[19] Record, Transcript of Proceedings, November 27, 1972, at 85-86.

[20] *Id.*, at 134 *et seq.*

[21] *Id.*, at 185-86. The parties disagree on whether other evidence before the District Court is indicative of area-wide violations by HUD. *See, e.g.*, Brief for Petitioner, at pp. 21, 23-24.

[22] Gautreaux v. Romney, 363 F. Supp. 690, 691 (N.D. Ill. 1973).

> . . . for further consideration in the light of this opinion, to wit: the adoption of a comprehensive metropolitan area plan that will not only disestablish the segregated public housing system in the City of Chicago which has resulted from CHA's and HUD's unconstitutional site selection and tenant assignment procedures but will increase the supply of dwelling units as rapidly as possible.[23]

However, upon petition for rehearing, the Court of Appeals significantly narrowed its holding. It reaffirmed its "view that the trial judge should not have refused to 'consider the propriety of metropolitan area relief' "[24] but remanded the case

> *for additional evidence and for further consideration of the issue of metropolitan area relief in light of this opinion and that of the Supreme Court in Milliken v. Bradley*. In the meantime, intra-city relief should proceed apace without further delay.[25]

On May 12, 1975, this Court granted HUD's petition for a writ of certiorari to review the Court of Appeals' judgment and remand.[26]

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[23] Gautreaux v. Chicago Housing Authority, 503 F.2d 930, 939 (7th Cir. 1974).

[24] *Id.*, at 939.

[25] *Id.*, at 940 (emphasis added).

[26] 44 L.Ed.2d 448 (1975).

ARGUMENT

INTRODUCTION

Decision of the question presented for review in this case will have broad and important implications for the future conduct of governmental housing programs and related activities which have, in this and other instances, been instrumental in the past in creating or exacerbating racial residential segregation. After careful consideration of the positions taken by the respective parties and study of the record in this matter, however, amici have concluded that the issues raised by Petitioner are not appropriately presented on this record; we very respectfully suggest that this Court should dismiss the writ of certiorari so that the matter may be returned to the trial court for the taking of evidence and further proceedings as directed by the Seventh Circuit's order on Petitioner's request for rehearing below.

Such a course of action is appropriate here for two reasons: first, the Petitioner in this matter is so little directly concerned with most of the various detailed aspects of a potential remedial decree about which it speculates and complains, that it should not be accorded standing to raise those issues; second, the "scope" of any supposed "inter-district" remedy which may ultimately be fashioned in this case is so completely undefined on this record that issues relating to its sufficiency or justifiability are simply not ripe for decision by this Court. Further proceedings in the trial court will not only complete the record, but will also provide ample opportunity for the parties who might be directly affected to be heard and to themselves seek such appellate review as they deem appropriate, following the shaping of an equitable decree by the District Court.

I.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AND REVIEW OF THIS MATTER POSTPONED UNTIL AFTER FURTHER PROCEEDINGS IN THE TRIAL COURT

A. Petitioner Does Not Have Standing To Attack The Judgment Of The Court Of Appeals On the Grounds Raised In Its Petition And Brief

Because this is a case involving racial discrimination by the Petitioner HUD, and because the plaintiffs have continously pressed for HUD's participation in a remedy designed to alleviate the effects of that discrimination, there is at first blush little reason to doubt HUD's right to attack, in this Court, a judgment which sends the case back to the District Court for reconsideration of the kind of remedy which should be ordered. However, Petitioner attacks not so much the Court of Appeals' judgment of remand as it does certain consequences to others which Petitioner speculates may occur as the result of that remand. Petitioner's standing to seek this Court's opinion about the potential orders which may be entered by the District Court on remand must therefore be carefully considered, for "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute *or of particular issues.*" *Warth v. Seldin*, 45 L.Ed.2d 343, 354 (1975) (emphasis added).

We respectfully submit that Petitioner lacks the necessary concrete adversary interests to warrant exercise of this Court's certiorari jurisdiction. The contours of the analysis are described in *Warth, supra*, 45 L.Ed.2d at 354-55:

> This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. . . .

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and that defendant within the meaning of Art. III. . . . The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. . . .
>
> . . . [T]his Court has recognized other limits on the class of persons who may invoke the court's decisional and remedial powers. . . . [E]ven when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . .

The "prudential considerations" of *Warth* apply to Petitioner here. *See* 45 L.Ed.2d, at 355-56, n. 12 and accompanying text. The question, therefore, is whether Petitioner can demonstrate sufficient "injury" to HUD to entitle it to litigate the issue it presents:

> Whether in light of *Milliken v. Bradley*, 418 U.S. 717, it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation. [Brief for Petitioner, at p. 2.]

Petitioner points to no language of the Court of Appeals which compels an order on remand restricting HUD in any particular way.[27] Although Petitioner

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[27] Consider Petitioner's description of the trial court proceedings which led to the Seventh Circuit reversal:

> In the order underlying the present Petition, the district court directed HUD to use its "best efforts to

[footnote continued]

makes much of the fact that, in its view, the Court of Appeals has mandated an "inter-district" remedy without finding an "inter-district violation" or an "inter-district effect" (Brief for Petitioner, at pp. 15-28),[28] it nowhere

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> cooperate with CHA in its efforts to increase the supply of dwelling units, in conformity with" all applicable federal statutes, HUD rules and regulations, and the provisions of the judgment against CHA and all other final orders in this litigation . . . .
>
> [Petitioner has expressed no objection to this decree.]
>
> The district court rejected the order proposed by Respondents, which would have directed CHA and HUD to use their best efforts to provide dwelling units outside the City of Chicago in Cook, DuPage and Lake Counties, and refused to conduct additional proceedings designed to develop a plan of metropolitan area-wide relief . . . .

(Brief for Petitioner, at pp. 9, 10). The Court of Appeals, however, did *not* direct the District Court to enter the order proposed by the plaintiffs (see note 16 *supra*). It did *not* direct the lower court to require HUD to use its best efforts to provide dwelling units outside Chicago without regard to "all applicable federal statutes, HUD rules and regulations," etc. It *merely* directed the trial court to conduct further proceedings in light of its opinion and that of this Court in *Milliken v. Bradley, supra.*

[28] The Seventh Circuit's remand does not require a metropolitan housing remedy, but rather reconsideration in light of *Milliken v. Bradley, supra.* Any doubt on this score was resolved by the Court's Order on Rehearing, which deliberately omitted language describing the result which was to flow from the further proceedings. 503 F.2d, at 940. The Order (mandate) of the Court of Appeals, issued August 26, 1974, merely states that the District Court's judgment is reversed and

> this cause be and the same is hereby REMANDED to the said District Court for further consideration in accordance with the opinion of this Court filed this day.

(No separate order was issued following consideration and disposition of HUD's petition for rehearing, although the opinion of the Court was amended as described above, p. 12, *supra.*)

[footnote continued]

indicates how the specific provisions of the decree affecting HUD will differ as a result of the Seventh Circuit's remand. Of course, it cannot, since no particular form of remedy has been directed pending reconsideration of the matter by the trial court.

Petitioner instead attacks the remand on two grounds. The first—that the record does not, in Petitioner's view, meet the *Milliken* standards for "inter-district" relief—is considered *infra,* pp. 19-25. The second is Petitioner's claim that an inter-district remedy which requires the construction of public housing outside Chicago, over the objection of local agencies or jurisdictions, will entail immense practical difficulties. But the practical problems discussed at great length in Petitioner's brief (pp. 28-40) all affect third parties, none of whom is before this Court.[29] No plan will be formulated or ordered until

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Petitioner thus errs in opening its argument by contending that the Seventh Circuit remanded this case "for 'the adoption of a comprehensive metropolitan area plan' (Pet. App. 59a)" as though that statement in the initial opinion of the panel were not modified by the terms of the Order denying HUD's petition for rehearing.

[29] Petitioner opens its argument on the merits as follows (Brief, pp. 15-16):

> The court of appeals, by remanding this case to the district court for "the adoption of a comprehensive metropolitan area plan" (Pet. App. 59a), has departed from the long-standing rule of federal equity practice that "the nature of the violation determines the scope of the remedy." *Swann v. Board of Education,* 402 U.S. 1, 16. See also *Brown v. Board of Education,* 349 U.S. 294, 300. *The state and local agencies that are made subject to the district court's remedial orders by that decision* (see p. 12, *supra*), with the exception of CHA itself, *have not been implicated* in any unlawful discrimination; *they have in effect been consolidated* for remedial purposes by the court of appeals apparently solely because the court believed that met-

[footnote continued]

after such parties have been joined and heard (*see* Brief for Petitioner, at p. 12).[30] Clearly, in this case nothing respecting "metropolitan" relief has yet occurred which so directly affects *Petitioner's* interests as to warrant this Court in reviewing the judgment below at Petitioner's request. Possible injury to third parties does not confer standing upon a litigant unless very unusual circumstances (not present here) make direct assertion of a claim by the injured parties improbable. *Warth v. Seldin, supra,* 45 L.Ed.2d, at 355-56.

The Petitioner, despite HUD's ongoing relationship with local agencies and political subdivisions, is not entitled to judicial recognition as the protector of their interests in litigation which does not directly affect HUD. *See County Court of Braxton County v. State ex rel. Dillon*, 208 U.S. 192 (1908) (county governing body members have no standing to attack, in Supreme Court, West Virginia statute whose effect will be to require county's default on bonds; only bondholders would have standing); *Diaz v. Patterson*, 263 U.S. 399 (1923) (fraudulent titleholder who unsuccessfully sued to establish his claim may not attack judgment of trial court on ground that court did not determine whether third

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ropolitan area-wide residential desegregation is a desirable goal of social policy. That judicial view of desirable social policy does not, standing alone, justify the award of inter-district relief. *Milliken v. Bradley*, 418 U.S. 717. [Emphasis added.]

[30] We do not interpret Judge Austin's Order permitting the filing of the Second Supplemental Complaint and adding additional parties defendant as an adjudication on the merits against these parties. Rather, it seems to us, the District Court has wisely determined to have all potentially affected parties before it when it reconsiders the question of metropolitan relief pursuant to the Seventh Circuit's remand. *Cf.* Milliken v. Bradley, *supra*, 418 U.S., at 752.

parties may have had better title than defendant); *ICC v. Chicago, R.I. & P.R. Co.*, 218 U.S. 88 (1910) (railroad may not attack ICC judgment reducing through rates on petition of shippers on ground that ICC left local rates unaltered, since effect of further action by ICC would not benefit, but further injure, railroads); *cf. Massachusetts v. Mellon*, 262 U.S. 447 (1923).

The only direct effect upon Petitioner of the Seventh Circuit's order is to lift from it an injunctive decree to which it did not object. (*See* note 27 *supra*.) After further proceedings take place, Petitioner may become subject to another injunctive decree, but there will be ample opportunity at that time to seek review of its provisions. There is, in sum, nothing about which Petitioner may properly complain since the Court of Appeals neither imposed any restrictions upon Petitioner nor denied relief which Petitioner sought. Thus, the "prudential considerations" identified in *Warth* counsel against according standing to HUD to litigate the "inter-district" issues it fears the District Court may address on remand. Since Petitioner lacks standing, the writ of certiorari should be dismissed. *Penfield Co. v. SEC*, 330 U.S. 585 (1947).

B. The Record In This Matter Is Insufficient To Permit Decision Of The Constitutional Claim Raised By Petitioner.

Petitioner seeks to have this Court answer a legal question which was never resolved by the trial court, which is posed in the abstract because it was never the focus of evidentiary presentation,[31] and which will

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[31] The District Court explicitly refused to consider the very evidence which Petitioner now asserts is essential. *See* text at notes 19, 20, *supra*.

be the subject of inquiry by the trial court pursuant to the judgment below. Because this record is inadequate to permit a reasoned disposition of the claim presented by Petitioner, the writ of certiorari should be dismissed as improvidently granted.

This record could hardly be more opaque with respect to the question presented by Petitioner to this Court:

> Whether, in light of *Milliken v. Bradley*, 418 U.S. 717, it is inappropriate for a federal court to order inter-district relief for discrimination in public housing in the absence of a finding of an inter-district violation.

(Brief for Petitioners, at p. 2.) As we earlier pointed out,[32] the Court of Appeals' disposition of this matter did *not* require adoption of a "metropolitan area plan." Its judgment did not "ma[k]e subject to the district court's remedial orders" the additional parties joined upon motion of the plaintiffs (*compare* Brief for Petitioners, at p. 15). That judgment certainly did *not* direct that injunctive decrees be entered against these parties irrespective of their "implication in any unlawful discrimination [or its effects]" (*id.*) but instead instructed the trial court to decide whether relief against such parties was appropriate under the principles of this Court's decision in *Milliken v. Bradley*. And by no stretch of the imagination can the Court of Appeals' ruling be said to have "consolidated" either the fourteen new parties defendant or the "more than 300" political jurisdictions to which Petitioner subsequently refers in the course of the *in terrorem* argument which it constructs (Brief for Petitioner, at p. 36.)

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[32] *See* note 28 *supra*.

If the "finding" of an "inter-district" violation or effect (*Milliken v. Bradley, supra*) is critical, then the Court of Appeals was eminently correct in remanding the case so as to permit the parties to present evidence and the District Court to make such a finding if warranted by that evidence.[33] Since the case was heard in the District Court long before *Milliken* was decided, neither the court nor the parties (including HUD) anticipated the potential relevance of such a finding. *Cf.* 503 F.2d, at 934.[34] The Court of Appeals reversed and remanded not because it posited "inter-district" relief without the necessary finding, but because the District Court improperly refused even to consider such relief. *Id.*, at 939. Plainly, the issue described by Petitioner is not in this case because the Court of Appeals has done no more than afford an opportunity for the District Court to receive evidence and to make such findings as are warranted by the evidence.

Of even greater significance is the absence of specific remedial directions in the remand. Not only does the Court of Appeals' order fail ipso facto to subject agencies who were not parties to the suit to future remedial

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[33] *See* note 31 *supra*.

[34] *See* Massachusetts v. Painten, 389 U.S. 560, 561 (1968):

> At the time of respondents' trial in 1958, Massachusetts did not have an exclusionary rule for evidence obtained by an illegal search or seizure . . . and the parties did not focus upon the issue now before us.
>
> . . .
>
> After oral argument and study of the record, we have reached the conclusion that the record is not sufficiently clear and specific to permit decision of the important constitutional questions involved in this case. The writ is therefore dismissed as improvidently granted
>
> . . . .

decrees, or to "consolidate" them, but it leaves wholly undefined the nature and scope of any "metropolitan" plan which might be ordered on remand. It is far from unreasonable to assume–especially in light of the District Court's cautious, step-by-step approach to remedy throughout the course of this litigation[35] – that the court may fashion "metropolitan" relief which is not "inter-district" in the *Milliken* sense. For instance, as the Brief of Respondents details, Petitioner HUD administers its housing programs by "market areas," of which the Chicago Housing Market Area is an example. Consistent with existing statutory law,[36] the District Court might on remand restrain HUD from financing housing programs throughout the entire Chicago Housing Market Area unless they meet the siting and tenant assignment requirements established in the 1969 intra-Chicago decree.

Such a remedy would be "metropolitan" or area-wide, but it would involve no decrees against new parties to the lawsuit, and it would not be "inter-district" in the *Milliken* sense. It would not take away from local jurisdictions any rights they have to determine whether to participate in federal housing programs (see Brief for Petitioner, at p. 36).[37] It would simply amplify the conditions (which local public housing programs already

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[35] *See* pp. 6-9, *supra.*

[36] 42 U.S.C. §5301 (c)(6): ". . . Federal assistance provided in this chapter is for the support of community development activities which are directed toward . . . the spatial deconcentration of housing opportunities for persons of lower income . . . ." *See also*, 42 U.S.C. §§1439(a)(3)-(4), 5304(a)(4)(c)(ii).

[37] The Housing and Community Development Act of 1974 authorizes HUD to bypass local governmental entities in some instances. *See* 42 U.S.C. §§1437f(b)(1)-(2).

must meet)[38] to be considered by a locality when making its decision. *Cf. Kelsey v. Weinberger*, 498 F.2d 701 (D.C. Cir. 1974). Such a decree would not "subject suburban governmental agencies . . . to substantial financial and administrative burdens" (*id.*, at p. 35) unless those agencies undertook to participate in federal housing programs. What such a decree *would* do is to require HUD to operate federal housing programs within the Chicago Housing Market Area in such a fashion as to alleviate the racial residential segregation which it helped to create.

A variety of other remedial approaches is appropriate under the judgment of remand entered by the Court of Appeals. For example, the District Court might direct HUD to act directly to provide additional housing units outside the City of Chicago pursuant to the "bypass" provisions of the Housing and Community Development Act of 1974.[39]

These remedial steps are a long way from the hypothetical decree which Petitioner assumes will be entered on remand (Brief for Petitioner, at pp. 35-40). Petitioner suggests that the Court of Appeals' ruling will necessarily deprive local jurisdictions of decision-making power with respect to undertaking public housing programs, over zoning and land use control, for provision of public services, etc., so as to constitute the District Court, "in

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[38] *See* Brief for Respondents in Opposition to Certiorari, at p. 13.

[39] 42 U.S.C. §1437f(b)(1) provides: ". . . In areas where . . . the Secretary determines that a public housing agency is unable to implement the provisions of this section, the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section." *See also*, 42 U.S.C. §1437(b)(2).

significant ways . . . the master metropolitan government" (*id.*, at 27). Such an assumption is unwarranted on this record.

Unquestionably, this Court's judgment about the appropriateness, under *Milliken v. Bradley*, of a decree which may be entered by the District Court pursuant to the Seventh Circuit's remand in this case will depend upon the exact nature of that decree. The questions of constitutional power and equitable discretion posed on the one hand by a decree against HUD alone, and on the other hand by a decree which purports to restrict the governmental powers of local jurisdictions in the manner suggested by Petitioner, will be markedly dissimilar.[40] But the record in this case, in its present form, is simply inadequate to permit the Court to determine exactly what sort of decree the trial court will in fact enter.

Traditionally, where such uncertainty of interpreting the opinion or judgment below has become apparent, and

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[40] Thus, the issue presented by Petitioner is not ripe for review. Wheeler v. Barrera, 417 U.S. 402, 426-27 (1974):

> The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals . . . [held] the matter was not ripe for review. We agree. As has been pointed out above, it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated . . . .
>
> . . . A federal court does not sit to render a decision on hypothetical facts . . . .

where that uncertainty can be clarified by further proceedings in the same, or even another, matter, this Court has declined to pass upon constitutional questions in the abstract and has dismissed writs of certiorari as improvidently granted. *E.g., Parker v. County of Los Angeles*, 338 U.S. 327 (1949); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *CIO v. McAdory*, 325 U.S. 472 (1945); *cf. Wheeler v. Barrera*, note 39 *supra*. That, we suggest, is the most appropriate disposition in this matter as well.

II.

SHOULD THIS COURT REACH THE MERITS, THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE IT IS CONSISTENT WITH MILLIKEN V. BRADLEY

We have suggested above that the proper disposition of this case is to dismiss the writ of certiorari, both because Petitioner lacks standing to argue the issue it presents for review and because this record is an insufficient basis upon which to determine the constitutional question presented by Petitioner. Should the Court consider the case on the merits, however, we believe that Respondents are entitled to prevail.

The thesis of the Petitioner's argument is that the Seventh Circuit's ruling in this case conflicts with, or erroneously interprets, the opinion in *Milliken v. Bradley*, *supra*. Since (as we have explained above) the judgment of the Court of Appeals merely remands to the District Court for reconsideration of "metropolitan" relief in light, *inter alia*, of *Milliken*, there is no basis upon which to alter that judgment. Although the opinion of the Court of Appeals is strongly supportive of the concept of metropolitan relief, the remand order anticipates that the

District Court will receive additional evidence and make specific findings before undertaking a fresh determination on remedy. Thus, Petitioner will have an adequate opportunity on remand to disprove what it has termed mistaken assumptions or erroneous factual interpretations by the Court of Appeals.[41] Should the case then be reappealed by any party, we trust that the record would contain specific factual findings by the District Court on the subjects of inquiry necessitated by both the Seventh Circuit's opinion and *Milliken*.[42] Such a record would permit complete appellate review.

In contrast, reversal of the judgment below would amount to a holding by this Court that "metropolitan," "inter-district," or "area-wide" relief in a segregation case is *never* appropriate, whether "inter-district violations," "inter-district effects," or simply "area-wide" discrimination can be proved. We do not believe the Court went so far in *Milliken*, nor that the door to meaningful relief from unlawful housing segregation should be so firmly, and precipitously, shut in this case. Accordingly, we submit that if the case is considered on its merits, the judgment below must be affirmed.

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[41] Neither the parties nor the District Court can be faulted for the present inadequate state of the record on the subject of "inter-district effects," since the evidentiary hearing which led to the District Court's order took place in September and November, 1972 – a year and a half before this Court rendered its opinion in *Milliken*. Pursuant to the Court of Appeals' remand, plaintiffs may offer additional evidence about HUD's area-wide violation and the appropriate remedy therefor, in addition to the evidence previously offered but refused by the District Court. HUD, or any added party, may attempt to rebut both the present evidence of record and any such additional evidence, or may propose such remedial alternatives as it deems fit. The District Court will then, for the first time in this litigation, make specific findings on the relevant issues.

[42] No longer bound by its unnecessarily narrow, pre-*Milliken* view of the case, the District Court will consider the nature and scope of the violations by HUD or any other parties, the range of remedies available against HUD and/or any other parties, and the appropriateness of those remedies to vindicate plaintiffs' rights to nondiscriminatory housing opportunities guaranteed by, *inter alia*, the Thirteenth Amendment, the 1964 and 1968 Civil Rights Acts, and the 1974 Housing and Community Development Act.

CONCLUSION

WHEREFORE, for the foregoing reasons, amici respectfully suggest that the writ of certiorari herein should be dismissed, or in the alternative that the judgment remanding the case for further proceedings should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1047

CARLA A. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Petitioner,

v.

DOROTHY GAUTREAUX *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICUS	1
ARGUMENT	2
Metropolitan Relief for Public Housing Discrimination Serves the Public Interest in Desegregating Urban and Suburban Schools	2

TABLE OF AUTHORITIES CITED

CASES:

Alexander v. *Holmes County Board of Education*, 396 U.S. 19 (1969)	2
Brown v. *Board of Education*, 349 U.S. 294 (1955)	2, 6, 7
Brown v. *Board of Education*, 347 U.S. 483 (1954)	6
Keyes v. *School District No. 1, Denver*, 413 U.S. 189 (1974)	2
Milliken v. *Bradley*, 418 U.S. 717 (1974)	2
Richmond School Board v. *State Board of Education*, 412 U.S. 92 (1973)	2, 5, 6
Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)	2, 5, 7

STATUTES AND REGULATIONS:

Executive Order 11513, March 3, 1970, 3 C.F.R. 900 (1970)	3
34 Stat. 805 (1906)	2

TABLE OF AUTHORITIES CITED—Continued

MISCELLANEOUS:	Page
The President's Commission on School Finance, *Schools, People & Money,* (1972)	3, 4, 5
Public Information Office, Office for Civil Rights, Department of Health, Education & Welfare, "Negroes in 100 Largest (1972) School Districts, Ranked by Size, Number and Percentage Attending School at Increasing Levels of Isolation, Fall, 1970 and Fall 1972, Elementary and Secondary School Survey"	3
United States Commission on Civil Rights, *Equal Opportunity in Suburbia,* (July 1974)	4, 5

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

INTEREST OF AMICUS [1]

The National Education Association ("NEA") is an independent, voluntary organization of educators, open to any person who is actively engaged in the profession

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

of teaching or other educational work, or any person interested in advancing the cause of education. NEA presently has more than 1,700,000 regular members and is the largest professional organization in the nation. Pursuant to the terms of its charter, 34 Stat. 805 (1906), NEA's purpose is "to elevate the character and advance the interests of the profession of teaching, and to promote the cause of education in the United States."

In pursuit of these goals, NEA has supported school desegregation in the North and South and to that end has submitted briefs amicus curiae in such cases as *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973); *Richmond School Board* v. *State Board of Education*, 412 U.S. 92 (1973); and *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

NEA believes that the scope of available relief for housing discrimination by federal and city agencies will have a significant bearing upon the extent of school segregation and quality of public education in the Nation's metropolitan areas. Recognizing that equity is "characterized by a practical flexibility in shaping its remedies and . . . adjusting and reconciling public and private needs," *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955), NEA files this brief for the purpose of urging the Court to take this relationship into account in passing upon the propriety of metropolitan remedies for such discrimination.

ARGUMENT

Metropolitan Relief for Public Housing Discrimination Serves the Public Interest in Desegregating Urban and Suburban Schools

Respondents have demonstrated that a metropolitan remedy is appropriate and necessary to redress the racially discriminatory housing practices of HUD and CHA. NEA endorses the factual and legal arguments presented by respondents and files this brief for the purpose of urging that there are other important considerations of public policy which will be served by a metropolitan remedy in this case. Among these considerations is that a metropolitan housing remedy will facilitate desegregation of schools in the Nation's metropolitan areas.

There is an urgent need for federal, state and local officials to take action that will desegregate the public schools in the Chicago and other major metropolitan areas. Statistics kept by the Department of Health, Education, and Welfare show that in 1970 75 percent of Chicago's black students attended schools in which no more than one percent of the student population was white. In 1972, 80 percent of Chicago's black students attended schools in which no more than one percent of the student population was white. In the 100 largest school districts in the United States in 1972, 42 percent of the black students were attending schools in which no more than one percent of the student population was white.[2]

Because of the extensive and growing concentration of blacks in inner city schools, minority children increasingly are on the receiving end of the inadequate education which characterizes inner city schools. As the President's Commission on School Finance[3] concluded in

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[2] Public Information Office, Office for Civil Rights, DHEW, "Negroes in 100 Largest (1972) School Districts, Ranked by Size, Number and Percentage Attending School at Increasing Levels of Isolation, Fall, 1970 and Fall 1972, Elementary and Secondary School Survey" (Table 3-A).

[3] The President's Commission on School Finance was appointed by the President of the United States pursuant to Executive Order 11513 of March 3, 1970, 3 CFR 900 (1970).

its final report, *Schools, People & Money* (1972) p. 43, the "children using these schools are being cheated of the opportunity to obtain a decent education." This conclusion does not depend upon the proposition that racial imbalance *per se* has adverse educational consequences. The dismal state of public education in the big cities is described by the President's Commission as follows:

> "The schools in the big cities are caught in two desperate crises—one financial, the other racial. And the two are becoming a single overriding emergency as inadequate funds affect school and education quality. Faced by rising property taxes and decreased social services including lowered school quality, business establishments and white middle-class families continue to flee to the suburbs. That flight, in turn, increases the isolation of low-income and minority children in the city schools. It also further reduces the ability of the cities to produce the funds to help them. This entire dismal cycle is already well known. Its effects have been publicized throughout the Nation as school budgets are cut, forcing systems to cut personnel, close schools for extended periods, and even consider 'payless paydays' for teachers. School buildings decay as maintenance funds are slashed. Meanwhile, tax bases decline as the exodus increases, further cutting revenues as needs mount. As the struggle goes on, the children using these schools are being cheated of the opportunity to obtain a decent education." *Id.*[4]

Although a metropolitan housing remedy would not fully desegregate the public schools of Chicago, it would

[4] Similar conclusions were recently reached by the United States Commission on Civil Rights:

> "Two of the sectors hardest hit by the extensive residential segregation which has accompanied rapid metropolitan growth have been education and employment. School desegregation has been thwarted and the separate school systems in the city and its surrounding suburbs are by no means equal." U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia*, p. 64 (July 1974).

help undo the school segregation that HUD's discriminatory practices have caused in the Chicago area. At the same time, a metropolitan remedy would accelerate residential desegregation of the white suburbs[5] and allow some black children to escape from the segregated and inadequate inner city schools. This in turn would tend to relieve the inner city schools and treasuries of some of the burdens that they now bear from heavy concentrations of low income families who have meager taxable resources but need greater than average amounts of school and city services.[6]

To date, this Court has not sustained a multi-district metropolitan school desegregation order. *Milliken* v. *Bradley*, 418 U.S. 717 (1974); *Richmond School Board* v. *State Board of Education*, 412 U.S. 92 (1973). In each of these cases, the United States questioned the propriety of such metropolitan relief, urging that school desegregation cases "'can carry only a limited amount of baggage,'" quoting *Swann* v. *Board of Education*,

[5] The U.S. Civil Rights Commission has found:

> "Blacks, like whites, choose their housing primarily for convenience to work, appropriate size and special features, and managable cost. They are generally willing to live in interracial areas if necessary to find desirable housing but are reluctant to live in areas that are practically all white. Black reluctance to leave black neighborhoods is in large part caused by a realistic appraisal of the barrier of housing discrimination and of the treatment they and their families might receive in white areas." U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia*, p. 14 (July 1974).

[6] See *Equal Opportunity in Suburbia*, p. 64, where the U.S. Commission on Civil Rights stated:

> "Although the central cities face more difficult education problems than the middle- and upper-income suburbs, they are forced by other economic considerations to spend proportionally less on schools and special programs. The city's cultural institutions and police, fire, and sanitation departments are just a handful of the competitors for its dwindling tax revenues."

See also, Presidents Commission on School Finance, *Schools, People & Money* (1972) p. 43 (quoted at p. 4, *supra*).

402 U.S. 1, 22-23 (1971).[7] In their memoranda in the *Richmond* (p. 25) and *Detroit* (pp. 25-26) cases, the Solicitors General said: "Racial discrimination in such areas as housing, employment and public expenditure are serious problems that must be attacked directly so that they can be eliminated from our society." We find it ironic that now, when the opportunity arises to attack "directly"—through the provision of metropolitan relief—housing discrimination to which the Federal government itself has been a party, the United States seeks to avoid such relief on the ground that it would entail substantial administrative problems (Pet. Br. pp. 34-40).

The metropolitan school remedies at bar in *Richmond* and *Detroit* would have required substantial busing in order to effectuate meaningful desegregation and would have entailed restructuring the administrative units. While NEA rejects the notion that such considerations constitute a per se bar to metropolitan relief in a school desegregation case, such factors are not present here. A metropolitan plan for subsidized housing would contribute meaningfully to school desegregation without additional busing and without merging school districts, creating new and larger school districts, or placing students in school jurisdictions different from the ones in which their parents reside.

To remedy school segregation declared unconstitutional in *Brown I*,[8] this Court looked to traditional equitable principles, "characterized by a practical flexibility in shaping . . . remedies and . . . adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955). Since *Brown II* the task of the courts has been "to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution," *Swann* v. *Board of Education*, 402 U.S. 1, 16 (1971). A metropolitan remedy in this case would not only redress the racially discriminatory housing practices of HUD and CHA, but offer an important step toward bringing the promise of *Brown* to minority group children locked in inner city schools.

[7] Memorandum for the United States as Amicus Curiae, *Richmond School Board* v. *State Board of Education*, Nos. 72-549, 72-550, p. 26; Memorandum for the United States as Amicus Curiae, *Milliken* v. *Bradley*, Nos. 73-434, 73-435, 73-436, p. 26.

[8] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

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